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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 709

VIRGINIA ELECTRIC AND POWER COMPANY,
PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 4, 1943.

CERTIORARI GRANTED ~~FEBRUARY~~ March 15, 1943.

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[fol. 1]

IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

Nos. 25 and 26

NATIONAL LABOR RELATIONS BOARD, Petitioner,

25 vs.

VIRGINIA ELECTRIC AND POWER COMPANY

NATIONAL LABOR RELATIONS BOARD, Petitioner,

26 vs.

THE INDEPENDENT ORGANIZATION OF EMPLOYEES OF THE VIRGINIA ELECTRIC AND POWER COMPANY

On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

OPINION—December 22, 1941

Mr. Justice MURPHY delivered the opinion of the Court:

Upon the usual proceedings [1] had pursuant to section 10 of the National Labor Relations Act [2] the Board made substantially the following findings of fact:

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[1] These proceedings were instituted on charges and amended charges filed in 1937 and 1938 by the Transport Workers Union of America, affiliated with the Congress of Industrial Organizations, by the Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America, and by the International Brotherhood of Electrical Workers, the latter two being affiliated with the American Federation of Labor. The complaint, as amended, charged that the employer, respondent in No. 25, had engaged in unfair labor practices within the meaning of section 8 (1), (2), and (3) of the Act; 29 U. S. C. § 158 (1), (2), and (3). The Independent Organization of Employees of the Virginia Electric and Power Company, respondent in No. 26, was allowed to intervene with respect to the 8 (2) charge, was represented by counsel and participated throughout the proceedings.

[2] 49 Stat. 449; 29 U. S. C. § 151 *et seq.*

For years prior to the events in this case the Virginia Electric and Power Company (hereinafter called the Company) was hostile to labor organizations. From 1922, when a strike was unsuccessful by a nationally affiliated union,[3] until the formation of the Independent Organization of Employees (hereinafter called the Independent) in 1937 there was no [fol. 2] labor organization among its employees. Shortly after the enactment of the National Industrial Recovery Act in 1933, Holtzclaw, the president of the Company, spoke to the employees and stated that any organization among them was "entirely unnecessary". Until his death in May 1937 the Company utilized the services of one Walters, an employee of the Railway Audit and Inspection Company who prior to the effective date of the Act admittedly furnished a report on the labor activity of the employees to the Company. In 1936 Bishop, Superintendent of Transportation in Norfolk, interrogated employees concerning union activities. On April 26, 1937, shortly after the Act was upheld,[4] and an A. F. of L. organizer had appeared, the Company posted a bulletin[5] throughout its operations

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[3] Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America.

[4] National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U. S. 1, and companion cases.

[5] "April 26, 1937.

To the Employees of the Company:

As a result of recent national labor organization activities and the interpretation of the Wagner Labor Act by the Supreme Court, employees of companies such as ours may be approached in the near future by representatives of one or more such labor organizations to solicit their membership. Such campaigns are now being pressed in various industries and in different parts of the country and strikes and unrest have developed in many localities. For the last fifteen years this company and its employees have enjoyed a happy relationship of mutual confidence and understanding with each other, and during this period there has not been any labor organization among our employees in any department, so far as the management is aware. Under these circumstances, we feel that our employees are entitled to know certain facts and have a statement as to the Company's attitude with reference to this matter.

appealing to the employees to bargain with the Company directly without the intervention of an "outside" union, and thereby coerced its employees. In response to this [fol. 3] bulletin several requests for increased wages and better working conditions were received.[6] The Company decided to withhold action on those requests and directed its employees to select representatives to attend meetings at

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The Company recognizes the right of every employee to join any union that he may wish to join, and such membership will not affect his position with the company. On the other hand, we feel that it should be made equally clear to each employee that it is not at all necessary for him to join any labor organization, despite anything he may be told to the contrary. Certainly, there is no law which requires or is intended to compel you to pay dues to, or to join any organization.

This Company has always dealt with its employees in full recognition of the right of every individual employee, or group of employees to deal directly with the Company with respect to matters affecting their interests. If any of you, individually or as a group, at any time, have any matter which you wish to discuss with us, any officer or department head will be glad, as they always have been, to meet with you and discuss them frankly and fully. It is our earnest desire to straighten out in a friendly manner, as we have done in the past, whatever questions you may have in mind. It is reasonable to believe that our interests are mutual and can best be promoted through confidence and cooperation.

(Signed) J. G. HOLTZCLAW,
President."

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[6] Included in those requsets was a petition from a majority of the Norfolk transportation employees which was the result of two meetings on Company property during working hours on May 11, 1937, in response to unsigned notices placed in the dispatcher's office by A. R. Ruett, a car operator. Both Ruett, and R. E. Elliott, who assumed the leadership in those meetings, testified that Superintendent Bishop had urged them to form an inside organization after warning them against the C. I. O. Bishop denied this, and the Board made no finding.

which Company officials would speak on the Wagner Act. These representatives met in Norfolk and Richmond on May 24 and were addressed by high Company officials who read identical speeches [7] stressing the desirability of form-

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[7] "A substantial number of its employees representing various departments and various occupations have approached the Company with the request that the Company consider with them the matter of their working conditions and wages. In other words, they have requested collective bargaining. The Company's position with respect to this was recently stated in a posted bulletin.

"In a company such as ours, if an individual operator, for example, should ask for himself better working conditions or wages, this Company could not comply with his request without also making the same concessions to other similar operators. In such a case the operator who appealed individually would, as a practical matter, be bargaining collectively for all of his group, which is not the logical procedure.

"This Company is willing to consider the requests mentioned above but feels that, in fairness to all of its employees and to itself, it should at the same time consider other groups who have not yet come to it. If the approaching negotiations are to be intelligent and fair to all properly concerned, they should be conducted in an orderly way, and all interested groups should be represented in these discussions by representatives of their own choosing, as provided in the Wagner National Labor Relations Act, which provides as follows:

'SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.'

"The Wagner Act applies only to employees whose work is in or directly affects interstate commerce and to companies engaged in interstate commerce. Counsel for this Company advise us that in their opinion the provisions of the Act do not apply to local transportation employees, to gas employees in Norfolk, or to certain strictly local employees of the light and power department. In spite of this, the

ing a bargaining agency. At the Richmond meeting it was announced that any wage increase granted would be retroactive to June 1. By the substance of the speeches and the mechanics of the meetings the Company gave impetus to [fol. 4] and assured the creation of an "inside" organization and coerced its employees in the exercise of their rights guaranteed by section 7 of the Act. Meetings, arranged with the cooperation of Company supervisors, on Company property and, in some instances on Company time, followed, at which the May 24 speeches were reported to the men who voted to form an "inside" organization and selected committees for that purpose. These committees met on Company property until June 15 when the constitution of the Independent was adopted.

While the Independent was in the process of organization, Edwards, a supervisor, kept meetings of a rival C.I.O. union under surveillance and warned employees that they

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Company wants to make it perfectly clear that its policy is one of willingness to bargain with its employees in any manner satisfactory to the majority of its employees and that no employee will be discriminated against because of any labor affiliations he desires to make.

"The petitions and representations already received indicate a desire on the part of these employees at least to do their own bargaining, and we are taking this means of letting you know our willingness to proceed with such bargaining in an orderly manner. In order to progress, it would seem that the first step necessary to be taken by you is the formation of a bargaining agency and the selection of authorized representatives to conduct this bargaining in such an orderly manner.

"The Wagner Labor Act prohibits a company from 'dominating or interfering with the formation or administration of any labor organization or contribute (*sic*) financial or other support to it.'

"In view of your request to bargain directly with the Company and, in view of your right to self-organization as provided in the law, it will facilitate negotiations if you will proceed to set up your organization, select your own officers and adviser, adopt your own by-laws and rules, and select your representatives to meet with the Company officials whenever you desire."

would be discharged for "messing with the C.I.O." On June 1 Mann, a member of the C.I.O. who had openly protested against an "inside" union at one of the May 11 meetings (see note 6 *ante*) attended by Superintendent Bishop's son, Warren, was discharged for union activities.

On June 17 application cards for the Independent were distributed throughout the entire system of the Company and many were signed on Company property and time. Within three weeks after the adoption of the constitution of the Independent a majority of the employees filled out application cards. By July 13 the organization was complete and permanent committeemen had been elected. A majority of those committeemen had been present at the May 24 meetings. On July 19 the Independent notified the Company that it represented a majority of the employees and submitted a proposed contract. Negotiations were begun on July 30 and agreement was reached by midnight of the following day. The contract was formally executed on August 5, and provided, *inter alia*, for a closed shop, a check-off, and a wage increase. On August 20 the Company paid $3,784.50 to the Independent although it had not yet deducted that entire amount from the em- [fol. 5] ployees' wages. On November 4, the date upon which the closed shop provision became effective, the Company discharged two employees, Staunton and Elliott, because they refused to join the Independent. In March, 1938, it discharged another employee, Harrell, for his membership and activity in an outside union.

Upon the basis of these findings and the entire record in the case the Board concluded that the Company had committed unfair labor practices within the meaning of section 8(1), (2) and (3) of the Act. Its order directed the Company to cease and desist from its unfair labor practices and from giving effect to its contract with the Independent, to withdraw recognition from and disestablish that organization, to reinstate with back pay the four wrongfully discharged employees, to reimburse each of its employees who was a member of the Independent in the amount of the dues and assessments checked off his wages by the Company on behalf of the Independent, and to post appropriate notices.

The Company and the Independent filed separate petitions in the court below to review and set aside the Board's order. The Board answered and requested enforcement

of its order against the Company. The court below denied enforcement to any part of the Board's order, completely setting it aside.[8] We granted the petition for writs of certiorari because the case was thought to present important questions in the administration of the Act. 312 U. S. 677.

The Company is engaged in the business of generating and distributing electrical energy in eastern Virginia and north-eastern North Carolina. It also furnishes illuminating gas to customers in the vicinity of Norfolk, Virginia, and operates transportation services in Richmond, Norfolk, Portsmouth and Petersburg. It does not here renew the contention, correctly decided against it by the court below,[9] that the jurisdiction of the Board does not extend to its employees in the gas and transportation departments.

Domination of the Independent

The command of section 10(e) of the Act that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive" precludes an independent consideration [fol. 6] of the facts. Bearing this in mind we must ever guard against allowing our views to be substituted for those of the agency which Congress has created to administer the Act. But here the Board's conclusion that the Independent was a Company dominated union seems based heavily upon findings which are not free from ambiguity and doubt. We believe that the Board, and not this Court, should undertake the task of clarification.

The Board specifically found that the bulletin of April 26 and the speeches of May 24 "interfered with, restrained and coerced" the Company's employees in the exercise of their rights guaranteed by section 7 of the Act. The Company strongly urges that such a finding is repugnant to the First Amendment. Neither the Act nor the Board's order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made. The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees. The employer in this case is as free now as ever to take any side it may choose

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[8] Virginia Electric & Power Co. v. National Labor Relations Board, 115 F. 2d 414.

[9] *Ibid*, 415-416.

on this controversial issue. But certainly conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways. For "Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 78.

If the Board's order here may fairly be said to be based on the totality of the Company's activities during the period in question, we may not consider the findings of the Board as to the coercive effect of the bulletin and the speeches in isolation from the findings as respects the other conduct of the Company. If the Board's ultimate conclusion is based upon a complex of activities, such as the anti-union background of the Company, the activities of Bishop, Edwards' warning to the employees that they would be discharged for "messing with the C. I. O.", the discharge of Mann, the [fol. 7] quick formation of the Independent, and the part which the management may have played in that formation, that conclusion would not be vitiated by the fact that the Board considered what the Company said in conjunction with what it did. The mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative power. In determining whether the Company actually interfered with, restrained, and coerced its employees the Board has a right to look at what the Company has said as well as what it has done.

But from the Board's decision we are far from clear that the Board here considered the whole complex of activities, of which the bulletin and the speeches are but parts, in reaching its ultimate conclusion with regard to the Independent. The Board regarded the bulletin on its face as showing a marked bias against national unions by implying that strikes and unrest are caused by the organizational campaigns of such bodies, by stressing the "happy rela-

tionship of mutual confidence and understanding" prevailing in the absence of organization since the defeat of the Amalgamated in 1922, and by emphasizing the negative "right" of the employees to refrain from exercising their rights guaranteed under the Act after paying "lip service" to those rights. Summing up its conclusions the Board said: "We interpret the bulletin as an appeal to the employees to bargain with the respondent directly, without the intervention of any 'outside' union. We find that by posting the bulletin the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

The Board was of the view that the speeches delivered in the meetings of May 24 provided the impetus for the formation of a system-wide organization, that they re-emphasized the Company's distaste for "outside" organizations by referring to the bulletin, and that, after quoting the provision of the Act forbidding employer domination of labor organizations, they suggested that the employees select their "own" officers, and adopt their "own" by-laws and rules. The Board's finding was: "We find that at the May 24 meetings the respondent urged its employees to organize and to do so independently of 'outside' assistance, and that it thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

It is clear that the Board specifically found that those utterances were unfair labor practices, and it does not ap- [fols. 8-10] pear that the Board raised them to the stature of coercion by reliance on the surrounding circumstances. If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone. The bulletin and the speeches set forth the right of the employees to do as they please without fear of retaliation by the Company. Perhaps the purport of these utterances may be altered by imponderable subtleties at work which it is not our function to appraise. Whether there are sufficient findings and evidence of interference, restraint, coercion, and domination without reference to the bulletin and the speeches, or whether the whole course of conduct evidenced in part by the utterances was aimed at achieving objectives forbidden by the Act, are questions for the Board to decide upon the evidence.

Here we are not sufficiently certain from the findings that the Board based its conclusion with regard to the Independent upon the whole course of conduct revealed by this record. Rather it appears that the Board rested heavily upon findings with regard to the bulletin and the speeches the adequacy of which we regard as doubtful. We therefore remand the cause to the Circuit Court of Appeals with directions to remand it to the Board for a redetermination of the issues in the light of this opinion. We do not mean to intimate any views of our own as to whether the Independent was dominated or suggest to the Board what its conclusion should be when it reconsiders the case. Since the Board rested the remainder of its order in large part on its findings with respect to the domination of the Independent, we do not at this time reach the other parts of the Board's order, including the command that the checked-off dues and assessments should be refunded.

Reversed and remanded.

Mr. Justice Roberts and Mr. Justice Jackson took no part in the consideration or decision of this case.

[fol. 11] BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. C-914

In the Matter of

VIRGINIA ELECTRIC & POWER COMPANY

and

TRANSPORT WORKERS UNION OF AMERICA

Case No. C-915

VIRGINIA ELECTRIC & POWER COMPANY

and

AMALGAMATED ASSOCIATION OF STREET, ELECTRICAL RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, An Unincorporated Association

Case No. C-916

VIRGINIA ELECTRIC & POWER COMPANY

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

ORDER VACATING AND SETTING ASIDE DECISION AND ORDER, AND DIRECTING ISSUANCE OF PROPOSED FINDINGS OF FACT, PROPOSED CONCLUSIONS OF LAW, AND PROPOSED ORDER

The Board, on February 27, 1940, having issued a Decision and Order in the above-entitled matter; and, thereafter, petitions to review and set aside the said Order having been filed in the United States Circuit Court of Appeals for the Fourth Circuit by Independent Organization of Employees of Virginia Electric & Power Company and respondent; the Board having answered and requested enforcement of its said Order; the matter having been presented to the said Circuit Court on briefs and oral argument; and, thereafter, on November 12, 1940, the said Circuit Court having entered its Decision and Decree vacating and setting aside the aforesaid Order of the Board and denying the Board's request for enforcement thereof; the said cause having been taken to the Supreme Court of the United States by virtue of a writ of certiorari; and the mandate of the said Supreme Court reversing the decree

of the said Circuit Court entered as aforesaid on November 12, 1940, and remanding the cause to the said Circuit Court with directions to remand to the National Labor Relations Board for a redetermination of the issues in the case in the light of the opinion entered by the said Supreme Court on December 22, 1941, having been filed in the said Circuit Court on January 28, 1942; and the said Circuit Court having entered its Order on March 9, 1942, remanding the cause to the National Labor Relations Board for a redetermination of the issues in the case in the light of the said opinion of the said Supreme Court of the United States; and the Board having duly considered the matter and being advised in the premises,

[fols. 12-94] It Is Hereby Ordered that the aforesaid Decision and Order of the National Labor Relations Board issued February 27, 1940, be, and it hereby is, vacated and set aside; and

It Is Further Ordered, pursuant to Article II, Section 37 (c) of National Labor Relations Board Rules and Regulations—Series 2, as amended, that Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order shall be issued; and

It Is Further Ordered, pursuant to Article II, Section 37, of the said Rules and Regulations, that the parties herein shall have the right, within thirty (30) days from the date of the said Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order, to file exceptions and a brief in support thereof, and that the said parties shall have the right, within twenty (20) days from the date of the said Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order, to request oral argument before the Board.

Dated, Washington, D. C., April 3, 1942.

By direction of the Board:

Beatrice M. Stern, Executive Secretary.

[fol. 95] [Stamp:] File in Informal File D

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. C-914

In the Matter of

VIRGINIA ELECTRIC & POWER COMPANY

and

TRANSPORT WORKERS UNION OF AMERICA

Case No. C-915

In the Matter of

VIRGINIA ELECTRIC & POWER COMPANY

and

AMALGAMATED ASSOCIATION OF STREET, ELECTRICAL RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, An Unincorporated Association

Case No. C-916

In the Matter of

VIRGINIA ELECTRIC & POWER COMPANY

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Mr. Gerhard P. Van Arkel, Mr. Reeves R. Hilton, and *Mr. Samuel M. Spencer,* for the Board.

Hunton, Williams, Anderson, Gay & Moore, by *Mr. T. Justin Moore* and *Mr. George D. Gibson,* of Richmond, Va., and *Venable, Miller, Pilcher, & Parsons,* by *Mr. Roman Miller,* of Norfolk, Va., for the respondent.

Mr. T. H. Latham, of Virginia Beach, Va., and *Mr. E. D. Bieretz,* of Washington, D. C., for the I. B. E. W.

Mr. Arthur E. Reyman, of New York City, *Mr. Floyd Kreisell,* of Columbus, Ohio, and *Zimring and Rabe,* by *Mr. O. David Zimring,* of Chicago, Ill., for the Amalgamated.

White, Temple, Hamilton & Wyche, by *Mr. W. Earle White,* of Petersburg, Va., and *Mr. Paul Hadlick* of Washington, D. C., for the I. O. E.

Mr. Owsley Vose, of counsel to the Board.

[fol. 96] STATEMENT OF THE CASE

On July 20, 1937, Transport Workers Union of America, herein called the T. W. U., filed with the Regional Director for the Fifth Region (Baltimore, Maryland), charges that Virginia Electric and Power Company, Richmond, Virginia,[1] herein called the respondent, had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. On August 26, 1937, the T. W. U. filed amended charges that the respondent had engaged in and was engaging in unfair labor practices, within the meaning of Section 8 (1), (2), and (3) and Section 2 (6) and (7) of the Act. On February 23, 1938, Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America, herein called the Amalgamated, filed with the Regional Director charges that the respondent had engaged in and was engaging in unfair labor practices, within the meaning of Section 8 (1) and (2) and Section 2 (6) and (7) of the Act. On April 2, 1938, and on April 13, 1938, International Brotherhood of Electrical Workers, herein called the I. B. E. W., filed with the Regional Director charges and amended charges, respectively, that the respondent had engaged in and was engaging in unfair labor practices, within the meaning of Section 8 (1), (2), and (3) and Section 2 (6) and (7) of the Act. On April 13, 1938, the National Labor Relations Board, herein called the Board, acting pursuant to National Labor Relations Board Rules and Regulations—Series 1, as amended, ordered that the cases be consolidated for the purpose of hearing. On May 7, 1938, the Board, by the Regional Director, issued its complaint against the respondent alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1), (2), and (3) and Section 2 (6) and (7) of the Act. Copies of the complaint, accompanied by notice of hearing, were duly served upon the respondent, the

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[1] Referred to as Virginia Electric & Power Company in the complaint.

I. B. E. W., the Amalgamated, the T. W. U.,[2] and The Independent Organization of Employees of Virginia Electric and Power Company, a labor organization, herein called the I. O. E.

Concerning the unfair labor practices the complaint alleged in substance that (1) since about May 1, 1937, the respondent dominated and interfered with the formation and administration of the I. O. E. and contributed support to it; (2) that the respondent on or about November 15, 1937, discouraged membership in the I. B. E. W. by terminating the employment of A. F. Staunton[3] and thereafter refusing to reinstate him because of his refusal to join the I. O. E. and because of his affiliation with the I. B. E. W.; on or about April 20, 1938, discouraged membership in the I. B. E. W. by terminating the employment of T. N. Harrell, Jr., and J. L. Judge,[4] and refusing to reinstate them because of their membership in the I. B. E. W. and because they had engaged in concerted activities with other employees; and that on or about May 30, 1937, the respondent discouraged membership in the T. W. U. by terminating the [fol. 97] employment of Everard M. Mann and refusing to reinstate him because of his membership in the T. W. U. and his concerted activities with other employees; (3) that the respondent on or about August 5, 1937, entered into an agreement with the I. O. E. providing, *inter alia*, that membership in said organization should be a condition of employment with the respondent and that said agreement was entered into with a labor organization which had been established, maintained, and assisted by unfair labor practices and which was not the representative of the respondent's employees as provided in Section 9 (a) of the Act; and (4) that the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act by making statements hostile to, and tending to discourage membership of its employeess in, the

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[2] Copies of the complaint and notice of hearing which were sent to Mont Crum, the person filing the amended charges for the T. W. U., were returned to the Board. The T. W. U. did not appear at the hearing nor participate in the proceedings.

[3] Referred to as Alfred Staunton in the record.

[4] Referred to as Johnny L. Judge in the record.

T. W. U., the I. B. E. W., and the Amalgamated, by maintaining surveillance over the efforts of its employees to form a labor organization, and by employing the service of detective agencies to render reports on the organizational activities of its employees.

On May 12, 1938, the I. O. E. filed a motion for intervention stating that it had entered into an agreement with the respondent on August 5, 1937, by which the respondent recognized it as the exclusive bargaining representative of all the respondent's employees with a few exceptions and denying that the respondent had dominated, supported, or interfered with it. On May 14, 1938, the respondent filed its answer denying that it was engaged in interstate commerce and denying that it had engaged in any of the unfair labor practices alleged in the complaint.

Pursuant to the notice, a hearing was held in Norfolk, Virginia, from May 19 to June 18, 1938, before James L. Fort, the Trial Examiner duly designated by the Board. The Board, the respondent, the I. B. E. W., the Amalgamated, and the I. O. E. were represented by counsel and participated in the hearing. The I. O. E. was permitted to intervene with respect to the alleged unfair labor practices within the meaning of Section 8 (2) of the Act. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties, subject, in the case of the I. O. E., to the limitation noted above. On May 21, 1938, the Amalgamated filed with the Regional Director amended charges alleging that the respondent had further engaged in unfair labor practices, within the meaning of Section 8 (1) and (3) of the Act by discouraging membership in the Amalgamated through its discharges of Joseph Bolton on or about January 15, 1938, and Robert E. Elliott, Jr., on or about November 3, 1937, and its refusals to reinstate them because of their membership in the Amalgamated. On motion of counsel for the Board the complaint was amended at the hearing to incorporate these allegations.[5] The Trial Examiner granted the motion of counsel for the Board made at the close of its case to conform the pleadings to the proof. During the course of the hearing the Trial Examiner made

[5] On June 16, 1938, the respondent filed an amended answer denying that it had engaged in unfair labor practices by its discharges of Bolton and Elliott.

rulings on other motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On September 13, 1938, the Trial Examiner filed his Intermediate Report, copies of which were served on all parties, in which he found that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1), (2), and (3) and Section 2 (6) and (7) of the Act, and recommended that the respondent cease and desist therefrom and take certain affirmative action to remedy the situation resulting from the unfair labor practices. He further recommended that the allegations of the complaint relating to the discharge of Joseph Bolton be dismissed.

[fol. 98] On September 23, 1938, the I. O. E. filed exceptions to the Intermediate Report and on September 26, 1938, the respondent filed exceptions to the Intermediate Report and a motion to dismiss the complaint. The respondent and the I. O. E. filed briefs in support of their exceptions to the Intermediate Report.

Pursuant to notice duly served on all the parties, a hearing was held before the Board in Washington, D. C., on April 11, 1938, for the purpose of oral argument. The respondent, the Amalgamated, the I. B. E. W., and the I. O. E. were represented by counsel and participated in the argument.

The Board, on February 27, 1940, after consideration of the exceptions to the Intermediate Report and the briefs submitted in support of said exceptions, issued its decision containing its findings of fact, conclusions of law, and order. In brief, the Board found that the respondent had dominated and interfered with the formation and administration of the I. O. E. and had contributed support to it in violation of Section 8 (2) of the Act; had discharged four employees [6] in violation of Section 8 (3) of the Act; and had by these and other acts interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the Act.

Thereafter, the respondent and the I. O. E. filed with the United States Circuit Court of Appeals for the Fourth

[6] Mann, Elliott, Staunton, and Harrell.

Circuit their separate petitions to review and set aside the Board's order, to which the Board filed answers requesting enforcement of its order. The Circuit Court, on November 12, 1940, after consideration of briefs and arguments of counsel for the respective parties handed down its decision sustaining the Board's jurisdiction but reversing and setting aside the Board's order in its entirety.[7] In March 1941, the Supreme Court of the United States granted the Board writs of certiorari to review the decision of the Circuit Court.[8] On December 22, 1941, the Supreme Court having considered the briefs and having heard arguments of counsel for the respective parties, handed down its decision remanding the cause to the Circuit Court of Appeals with directions to the Circuit Court to remand the cause to the Board for a redetermination of the issues in the light of the Supreme Court's opinion.[9] On March 9, 1942, the Court of Appeals formally remanded the case to the Board pursuant to the mandate of the Supreme Court. On April 3, 1942, the Board entered an order vacating and setting aside its Decision and Order dated February 27, 1940, and directing that Proposed Findings of Fact, Proposed Conclusions of Law, and a Proposed Order be issued.

On July 6, 1942, the Board issued said Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order, copies of which were served on all parties, finding that the respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1), (2), and (3) [fol. 99] and Section 2 (6) and (7) of the Act, and directing that the respondent cease and desist from its unfair labor

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[7] 115 F. (2d) 414.

[8] 312 U. S. 677.

[9] The Supreme Court, taking the view that the Board's ultimate conclusion that the respondent had violated Section 8 (1) and (2) of the Act rested largely upon a bulletin posted on April 26, 1937, and speeches delivered to representatives of the employees on May 24, 1937, the adequacy of which standing alone the Court regarded as doubtful, held that whether the respondent's "whole course of conduct," of which the bulletin and the speeches were a part, warranted findings of interference and domination was "for the Board to determine upon the evidence." (313 U. S. 469, 479).

practices, withdraw all recognition from and disestablish the I. O. E., reimburse employees in the amount of dues deducted from their wages on behalf of the I. O. E., and offer reinstatement with back pay to Everard M. Mann, A. F. Staunton, and T. N. Harrell, Jr. Exceptions to the Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order and briefs in support thereof were filed by the respondent and the I. O. E.

Pursuant to notice and at the request of the respondent and the I. O. E., a hearing was held before the Board at Washington, D. C., on August 25, 1942, for the purpose of oral argument. The respondent, the I. O. E. and the I. B. E. W. were represented by counsel and participated in the argument. The Board has considered the exceptions to the Proposed Findings, Proposed Conclusions of Law, and Proposed Order and the briefs in support thereof and, insofar as the exceptions are inconsistent with the findings, conclusions, and order set forth below, finds them to be without merit.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The business of the respondent

The respondent, Virginia Electric and Power Company, was incorporated in Virginia on June 29, 1909, as the Virginia Railway and Power Company. On October 27, 1925, it adopted its present name. The respondent is engaged, among other things, in the business of generating, distributing, and selling electrical energy in eastern Virginia and northeastern North Carolina. The area served comprises approximately 10,000 square miles, has an estimated population of 767,000 and includes the cities of Richmond, Norfolk, Portsmouth, Petersburg, Hopewell, Suffolk, and South Norfolk, Virginia, and the cities of Roanoke Rapids, Weldon, Williamston, and Plymouth, North Carolina. In addition, the respondent furnishes for resale electrical energy to 9 municipal systems serving a population of 26,000. The respondent is also engaged in the business of supplying illuminating gas to consumers situated in Norfolk, South Norfolk, and Norfolk County, Virginia. The respondent likewise operates street railway and bus lines in Richmond and Norfolk, bus lines in Portsmouth and Petersburg, and

interurban bus lines between Richmond and Petersburg. Its principal office is located in Richmond, Virginia, and it maintains 14 branch offices in various cities and towns in Virginia and North Carolina. As of December 31, 1937, respondent had a total of 3,437 employees.[10]

The respondent maintains 4 hydro-electric generating plants and 3 steam generating plants with a total capacity of approximately 173,000 kilowatt hours, 5 of which are in Virginia and 2 in North Carolina, and operates approximately 250 substations. It has transmission line interconnections with the Virginia Public Service Company at Occoquan, Virginia, and at Roanoke Rapids, North Carolina, and 2 transmission line interconnections with the Carolina Power and Light Company in North Carolina. During the year 1937 the respondent purchased from the abovenamed companies 7.1 per cent of its own total electric output. During 1937 the electric energy generated and purchased by the respondent aggregated 664,859,694 kilowatt hours, of which the respondent transmitted about 52,000,000 kilowatt hours from Virginia to North Carolina and approximately 39,000,000 kilowatt hours from North Carolina [fol. 100] to Virginia. Among the consumers of the power generated and purchased by the respondent are railroads, telegraph companies, telephone companies, newspapers, radio stations, shipyards, airports, and agencies furnishing aid to navigation.

In addition to operating a street railway and bus system in Richmond and Norfolk, bus service in Portsmouth and Petersburg, and interurban bus service between Richmond and Petersburg, the respondent maintains in Virginia shops, garages, and car barns for the storing, overhauling, and repairing of its street cars and motor busses. The transportation system of the respondent as of December 31, 1937, included approximately 133 miles of equivalent single track, 251 passenger street cars, and 294 busses. In 1937, the respondent's transportation department used 31,253,514 kilowatt hours of power generated by the electrical department.

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[10] In its original brief to the Board the respondent asserted that on April 30, 1938, it had 1,169 employees in the electric department, 112 in the gas department, and 1,259 in the transportation department.

As of December 31, 1937, the respondent maintained in Norfolk, Virginia, 2 gas generating units of approximately equal size with a total rated generator capacity of 8½ million cubic feet per day, a holder capacity of 5,273,000 cubic feet, and 332 miles of high and low pressure gas mains. During 1937 approximately 1,253,000 kilowatt hours of power generated by the electrical department were used in the manufacture of gas.

For the operation of its electrical, transportation, and gas systems in 1937, the respondent purchased considerable amounts of materials coming from points outside the Commonwealth of Virginia. For the generation of electrical energy 295,207 tons of coal were used, more than 50 per cent of which were purchased in West Virginia. About 2,587,000 gallons of gasoline, consumed by the busses of the respondent, were purchased in the Commonwealth of Virginia but originated in sources outside the Commonwealth. The busses, street cars, and tires used by the respondent were also bought in States other than Virginia. To produce the gas distributed by it, the respondent consumed 10,821 tons of coal, most of which were purchased in West Virginia; 3,800 tons of coke, which were shipped to the respondent through West Virginia although purchased in Virginia; and 3,290,000 gallons of oil purchased in Virginia but originating in States other than Virginia.

The respondent concedes that the employees engaged in the transmission process of the electrical department are engaged in interstate commerce, but argues that all its other employees are not subject to the Board's jurisdiction. We find, however, not only (1) that the respondent maintains facilities in North Carolina and in Virginia for the generation and distribution of electrical energy; (2) that large amounts of electrical energy generated by the respondent are transmitted across State lines; (3) that the respondent purchases electrical energy which is transmitted to it across State lines; (4) and that instrumentalities of interstate commerce, such as railroads, telephone, and telegraph companies, use electrical energy supplied by the respondent; but also (5) that the respondent receives large quantities of coal, coke, and other commodities in interstate commerce for its transportation and gas departments; and (6) that the respondent is an integrated enterprise with a centralized management and general office force and with

some sharing of common facilities by the transportation and electrical departments. We conclude that a cessation of the respondent's business resulting from a labor dispute between the respondent and its employees (a) would affect the flow of large quantities of electrical energy and other commodities received and distributed by the respondent in interstate commerce and (b) would tend to burden and obstruct the operation of various instrumentalities of interstate transportation and communication.

[fol. 101] II. The organizations involved

Transport Workers Union of America is a labor organization affiliated with the Committee for Industrial Organization,[11] admitting to its membership employees engaged in the transportation operations of the respondent.

Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America is a labor organization affiliated with the American Federation of Labor. It admits to membership all the employees engaged in the respondent's electrical railway and bus system, excluding supervisory, office, and clerical employees.

International Brotherhood of Electrical Workers is a labor organization affiliated with the American Federation of Labor. It admits to membership all types of electrical workers of the respondent.

The Independent Organization of Employees of Virginia Electric and Power Company, an unaffiliated labor organization, admits to membership all employees of the respondent excluding supervisory, part-time, and confidential employees.

III. The unfair labor practices

A. *Background*

The respondent in the past has been opposed to the organization of its employees; from 1922, when the Norfolk, Richmond, Portsmouth, and Petersburg street car operators unsuccessfully went out on strike in protest against the respondent's refusal to renew a preexisting contract until 1937, the respondent's employees remained totally unorganized. The respondent's attitude towards the organiza-

[11] Now the Congress of Industrial Organizations.

tion of its employees was epitomized in the statement of Jack G. Holtzclaw, the respondent's president, made in the course of a message to employees delivered shortly after the enactment of the National Industrial Recovery Act in 1933, that "It would be very foolish and entirely inconsistent with the past policy of our Company's operations if I did not state definitely to our employees that it is our belief that the organization of our employees for any purpose in this Company for their protection or collective bargaining or whatnot is entirely unnecessary." Although Holtzclaw quoted from Donald Richberg and Hugh Johnson on the subject of employees' rights to organize under the N. I. R. A., the message as a whole makes it clear that the respondent strongly disapproved of the employees exercising those rights, and we so find.

B. *The I. O. E.; interference, restraint, and coercion*

At the time of the passage of the Act in July 1935 the respondent was using the full-time services of one Walters, an undercover operative furnished by the Railway Audit and Inspection Company;[12] the respondent continued to use his service until Walters' death in May 1937. One of the purposes for which Walters was employed was to report on labor activities among the employees at Norfolk. Walters reported to E. L. Bishop, the superintendent of the Norfolk transportation department. Following the typical technique of the labor spy, Walters posed as an energetic advocate of unionism, on one occasion openly supporting [fol. 102] a strike at a Norfolk garment factory, addressing the strikers over a loudspeaker system. He was accepted by union officials and members alike as a sympathizer with organized labor when he attended meetings of the Norfolk Central Labor Union.

Superintendent Bishop, to whom Walters reported, himself sought to uncover organizing activities among the employees. In 1936, after being informed that a group of his employees were considering organizing, he admittedly

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[12] On the industrial espionage and strikebreaking activities of the Railway Audit and Inspection Company see Sen. Rep. No. 46, Part 3, 75th Cong., 2nd Sess. pp. 18, 88; Sen. Rep. No. 6, 76th Cong., 1st Sess., pp. 82, 183-195.

summoned several employees to his office and questioned them about it.

In March 1937 an A. F. of L. organizer met the chief engineer of the Reeves Avenue, Norfolk, power plant and advised him that the A. F. of L. intended to organize the men.[13] An A. F. of L. organizer began distributing circulars among the Richmond employees in March or April 1937. On April 12, 1937, the Supreme Court of the United States upheld the constitutionality of the Act.[14] On April 26, 1937, the respondent posted the following bulletin throughout its operations, purporting to advise the employees as to their rights under the Act:

To the Employees of the Company:

As a result of recent national labor organization activities and the interpretation of the Wagner Labor Act by the Supreme Court, employees of companies such as ours may be approached in the near future by representatives of one or more such labor organizations to solicit their membership. Such campaigns are now being pressed in various industries and in different parts of the country and strikes and unrest have developed in many localities. For the last fifteen years this Company and its employees have enjoyed a happy relationship of mutual confidence and understanding with each other, and during this period there has not been any labor organization among our employees in any department, so far as the management is aware. Under these circumstances, we feel that our employees are entitled to know certain facts and have a statement as to the Company's attitude with reference to this matter.

The Company recognizes the right of every employee to join any union that he may wish to join, and such member-

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[13] Upon being advised of this a few hours later President Holtzclaw immediately issued orders that the organizer be instructed that he could do no organizing during working hours or on company property.

[14] *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, rev'g 83 F. (2d) 998 (C. C. A. 5), and aff'g *Matter of Jones & Laughlin Steel Corporation* and *Amalgamated Association of Iron, Steel & Tin Workers of North America, Beaver Valley Lodge No. 200*, 1 N. L. R. B. 503, and companion cases.

ship will not affect his position with the Company. On the other hand, we feel that it should be made equally clear to each employee that it is not at all necessary for him to join any labor organization, despite anything he may be told to the contrary. Certainly, there is no law which requires or is intended to compel you to pay dues to, or to join any organization.

This Company has always dealt with its employees in full recognition of the right of every individual employee, or group of employees, to deal directly with the Company with respect to matters affecting their interests. If any of you, individually or as a group, at any time, have any matter which you wish to discuss with us, any officer or department [fol. 103] head will be glad, as they always have been, to meet with you and discuss them frankly and fully. It is our earnest desire to straighten out in a friendly manner, as we have done in the past, whatever questions you may have in mind. It is reasonable to believe that our interests are mutual and can best be promoted through confidence and cooperation.

(Signed) J. G. Holtzclaw, President.

Shortly after the respondent posted this bulletin, after observing the transportation employees engaged in group discussions, Superintendent Bishop, as in 1936 when he suspected the employees of attempting to organize, sought out one of them Anthony R. Ruett, and queried him as to what the men were discussing. Ruett replied, so he testified, that the men were talking about desiring wage increases, about other firms giving increases, and their right under the Act to organize unions and ask for wage increases. Bishop inquired, according to Ruett, whether the men were talking about joining the C. I. O. or the A. F. of L. and warned: "You don't want no C. I. O. or any other organization to come in here and tell you what to do, because the company is not going to recognize them and, in fact, they have money put away for the purpose of fighting the unions." Bishop added that "unions were no good and that they were nothing but trouble-makers" and suggested, Ruett testified, that "the best thing for the men to do was to get amongst themselves and form their own organization and present their claims." Bishop admitted having suggested to Ruett that he call a meeting for the purpose of selecting a committee to present their demands to the respondent,

but denied having suggested that they form an organization. Bishop also denied at any time having asserted that the respondent had funds with which to fight unions. The remainder of Ruett's testimony referred to above was undenied. We are not convinced by Bishop's partial denial and find that he made the statements attributed to him by Ruett.

Pursuant to Bishop's suggestion, Ruett scheduled two meetings of the car and bus operators on May 11, 1937, one in the morning and one in the afternoon. Robert E. Elliott, Jr. a car operator, who, prior to these meetings had drafted a petition requesting improved wages, hours, and working conditions, was selected to act as chairman of the meetings. Bishop spoke briefly to the employees at the morning meeting and left. Elliott presented his petition to the employees at both meetings and virtually all of them signed it. At the morning meeting, which was attended by Superintendent Bishop's son, not an employee of the respondent, and Dispatcher Fields, Everard M. Mann, a car operator, spoke out vigorously against the formation of an independent union and urged affiliation with a national union, preferably the C. I. O. A number of the men agreed with him, and one of them immediately after the meeting sought out the C. I. O. organizer, who was currently carrying on an organizing campaign in the Norfolk area, and signed a C. I. O. card.

After a large majority of the transportation employees at Norfolk had signed the petition, it was presented to Superintendent Bishop by a committee of six elected at the first meeting. About this same time several other groups of employees presented to their supervisors petitions for increased wages or better hours or working conditions, President Holtzclaw concluded that to deal with these and other similar groups would lead to "chaotic" conditions, and after consulting with the supervisory staff it was decided that the respondent's position in this matter should be communicated to the employees. The respondent decided that it would have the employees in every department select representatives for the purpose of attending meetings at which high officials of the respondent would deliver a message, which the representatives were to carry back to their constituents. Pursuant to this decision, supervisory [fol. 104] officials throughout the respondent's system con-

voked meetings of their subordinates on company time and property and instructed them to select representatives to hear the respondent's message. The supervisory officials carefully absented themselves from the meetings, pursuant to instructions from President Holtzclaw. The employees complied with these instructions and the representatives selected attended meetings in the respondent's office buildings at Richmond and Norfolk on May 24. At Richmond, President Holtzclaw, and at Norfolk, R. J. Throckmorton, vice president in charge of the respondent's Norfolk operations, delivered the following prepared address:

A substantial number of its employees representing various departments and various occupations have approached the Company with the request that the Company consider with them the matter of their working conditions and wages. In other words, they have requested collective bargaining The Company's position with respect to this was recently stated in a posted bulletin.

In a Company such as ours, if an individual operator, for example, should ask for himself better working conditions or wages, this Company could not comply with his request without also making the same concessions to other similar operators. In such a case the operator who appealed individually would, as a practical matter, be bargaining collectively for all of his group, which is not the logical procedure.

This Company is willing to consider the requests mentioned above but feels that, in fairness to all of its employees and to itself, it should at the same time consider other groups who have not yet come to it. If the approaching negotiations are to be intelligent and fair to all properly concerned, they should be conducted in an orderly way, and all interested groups should be represented in these discussions by representatives of their own choosing, as provided in the Wagner National Labor Relations Act, which provides as follows:

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

The Wagner Act applies only to employees whose work is in or directly affects interstate commerce and to companies

engaged in interstate commerce. Counsel for this Company advise us that in their opinion the provisions of the Act do not apply to local transportation employees, to gas employees in Norfolk, or to certain strictly local employees of the light and power department. In spite of this, the Company wants to make it perfectly clear that its policy is one of willingness to bargain with its employees in any manner satisfactory to the majority of its employees and that no employee will be discriminated against because of any labor affiliations he desires to make.

The petitions and representations already received indicate a desire on the part of these employees at least to do their own bargaining, and we are taking this means of letting you know our willingness to proceed with such bargaining in an orderly manner. In order to progress, it would seem that the first step necessary to be taken by you is the formation of a bargaining agency and the selection of au- [fol. 105] thorized representatives to conduct this bargaining in such an orderly manner.

The Wagner Labor Act prohibits a company from "dominating or interfering with the formation or administration of any labor organization or contributing financial or other support to it."

In view of your requests to bargain directly with the Company and, in view of your right to self-organization as provided in the law, it will facilitate negotiations if you will proceed to set up your organization, select your own officers and adviser, adopt your own by-laws and rules, and select your representatives to meet with the company officials whenever you desire.

Holtzclaw added, at the conclusion of the quoted speech, that any wage increase granted by the respondent would become effective as of June 1, 1937; Throckmorton did not. As to all other material incidents the two meetings were substantially identical. Employees asking whether they had to join a labor organization and what kind of organization they should form were told that they need join none and were refused advice as to the type of organization they should adopt. As the respondent's officials left these meetings, in accordance with arrangements made beforehand, they announced that the representatives might remain for further discussion of the matters broached. At both meet-

ings, a substantial number of the representatives remained, and discussed the benefits to be derived from organizing. The Richmond representatives, after electing a temporary chairman "to push this thing into an organization," decided to inform their constituents as to what had occurred at the meeting and to report back their reactions at a meeting of the representatives to be held on June 1. The Norfolk representatives decided to ascertain the reaction of their constituents to the message and to bring written authorizations from them to a meeting on June 1.

Pursuant to these decisions, during the following week meetings of employees were held in almost every department. The respondent's supervisors actively cooperated. Superintendent of Distribution Crafton arranged to have the Norfolk linemen brought in without working overtime so that they could hear their representative report to his department. Superintendent Davis, of the Reeves Avenue plant in Norfolk, gave permission for the use of the company auditorium on May 27. Superintendent of Installation Walke in Richmond permitted the use of the Service Building for meetings of the line department and the engineering group during working hours, and held the linemen in the office so that they could attend. At each meeting, after the respondent's message had been reported to the men, they immediately voted to form an unaffiliated union and elected representatives for that purpose, the same representatives for the most part that they had previously selected at the respondent's request to hear the May 24 message.

The June 1 meetings were held as scheduled, the representatives from the Richmond area meeting in the auditorium of the respondent's Service Building and the representatives from the Norfolk area meeting in the respondent's general office building at Norfolk. The Richmond representatives constituted themselves a steering committee to form an organization without "outside aid or interference" and designated a committee to consult with a Norfolk committee on selection of a lawyer to draw up a constitution and plan of organization. On June 3 committees from both Richmond and Norfolk met at the respondent's office building at Petersburg and appointed representatives to employ an attorney to draft a constitution and by-laws for a system-wide organization. Several days later, W.

Earle White of Petersburg was retained for this purpose. On June 7 the Norfolk representatives again met in the [fol. 106] respondent's general office building at Norfolk, and, like the Richmond representatives constituted themselves a steering committee for the formation of an unaffiliated system-wide organization.

On June 9 the Richmond steering committee met in the respondent's service building at Richmond [15] and discussed the proposed constitution and by-laws prepared by Attorney White. The Norfolk steering committee met on June 11 in the respondent's general office building and again on June 14 in the auditorium of the respondent's Reeves Avenue plant to consider the proposed constitution and by-laws.

On June 14 the Richmond steering committee requested the respondent to furnish by noon of the next day a list by departments and subdivisions thereof of the names of all the "worker personnel" of the respondent below the rank of foreman or supervisor, or in the alternative, to furnish a detailed statement as to the numbers of non-supervisory employees in all the respondent's departments and subdivisions thereof. The respondent, the same day it received the request, furnished the latter statement and promised to submit the list of names requested as soon as it could be prepared.

On June 15 the Norfolk and Richmond representatives met in the American Legion Hall at Richmond and formally adopted the constitution and by-laws of the I. O. E. The constitution provides for 4 divisional committees at Norfolk: the transportation, electric, gas, and accounting, sales, and general office committees; and 3 divisional committees at Richmond: the transportation, electric, and accounting, sales, and general office committees. In the Norfolk division, employees in 14 voting sections, which correspond roughly to the various departments operated by respondent in this division, elect representatives to the 4 divisional committees. In the Richmond division employees in 13 voting sections elect representatives to the 3 divisional committees there. The representatives of the 4 divisional committees at Norfolk constitute the Norfolk interdepartmental committee and the representatives of the 3 divisional

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[15] This is stated in the brief submitted to the Board by counsel for the I. O. E.

committees at Richmond constitute the Richmond interdepartmental committee. The interdepartmental committees elect from their own number representatives to the general committee, the supreme body of the I. O. E. The constitution and by-laws make no provision for the holding of meetings of members of the various voting sections.[16]

On June 17 application cards for membership in the I. O. E., were distributed throughout the entire system; a number of them were signed on the respondent's premises during working hours. Solicitation of memberships in outside organizations also occurred on the respondent's premises during this period. Within 2 weeks a majority of the respondent's employees applied for membership in the I. O. E.

On June 22 a general meeting of the Norfolk employees was convened for the purpose of explaining the constitution and by-laws of the I. O. E. Thereafter, elections were held off the respondent's premises: on July 2, to nominate representatives of the various voting sections of the I. O. E., and on July 12, to elect the representatives. On July 13 the Norfolk steering committee announced the results of the elections and then dissolved. The voting section representatives then voted for officers to the interdepartmental committees and a delegate-at-large to the general committee. A meeting was held in Richmond on July 16 at which the Richmond steering committee was dissolved and the officers [fol. 107] of the interdepartmental committee and representatives to the general committee were elected.

On July 17 and 18, 1937, the various interdepartmental representatives and general committeemen held a convention at Ocean View, Virginia. After discussing the desires of their constituents, the various representatives, with the assistance of Attorney White, drafted a proposed contract to be submitted to the respondent, embodying demands for a closed shop,[17] check-off of I. O. E. dues, and substantial wage increases. On July 19 the I. O. E. notified the respond-

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[16] Subsequently the by-laws were amended by the General Committee to provide for annual meetings of the members of the various voting sections.

[17] That is, the I. O. E. asked that all present and future employees be required to join the organization after a specified period.

ent that it represented more than 50 per cent of the respondent's employees, submitted the proposed contract, and requested that a date be set for its discussion. On July 21, the respondent set July 30 as the date for the negotiations and requested that a certificate as to the organization's membership and right to represent the employees be furnished prior to the conference. This was done.

The bargaining conference opened on the morning of July 30 with a discussion of the general provisions, that is, the recognition, the closed-shop, the check-off, and the grievance procedure provisions. The recognition clause was readily agreed to. The respondent in the recognition clause agreed to permit the I. O. E. to erect bulletin boards on company property. The respondent offered no objection to the check-off provision, providing for the deduction of I. O. E. dues from members' wages upon written orders signed by the members, but added the proviso that such orders might be revoked at any time.[18] The respondent at once agreed to the grievance procedure provisions with minor variations. The closed-shop provision was discussed for 2 hours at the opening session; further discussion was postponed while the representatives of various departments split up and discussed with departmental officials of the respondent matters pertaining to their departments. Discussion of the closed-shop issue was not resumed until the final session of the conference when, after 2 hours further discussion, the closed-shop provision was agreed upon[19] and wage increases, costing the respondent $600,000 annually, were granted. The wage increase was made retroactive to June 1, 1937, as President Holtzclaw, on May

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[18] In view of the closed-shop provision to which the respondent agreed on the following day and the provision in the I. O. E.'s constitution and bylaws requiring all members to authorize the deduction of dues, the proviso added by the respondent is totally without effect.

[19] Under the closed-shop provision all present employees were given 90 days in which to join the I. O. E.; future employees were required to join within 90 days from the date of their hiring. At the instance of the respondent the proviso was added that nothing in the contract should prevent employees from joining or remaining members of any other labor organization.

24, had promised. After ratification by the interdepartmental committees, the contract was formally executed on August 5, 1937.

On August 20, 1937, the respondent paid the I. O. E. $3,784.50 as dues, pursuant to the check-off provision in the contract, although it had not yet deducted that entire amount from the wages of the employees. On October 28 the respondent posted a notice throughout its entire system, stating that the 90-day period provided for in the contract would expire on November 4, 1937, and that it was necessary for all its employees to join the I. O. E. by that date. On November 4 the respondent discharged two employees who refused to join the I. O. E.[20]

[fol. 108] The respondent's attitude towards nationally affiliated organizations during the crucial organizing period of the I. O. E. contrasts sharply with its highly cooperative attitude towards the I. O. E. Everard M. Mann, who had openly espoused affiliation with the C. I. O. at the meeting of the Norfolk transportation employees held on May 11 at the behest of Superintendent Bishop, was summarily and unlawfully discharged on the eve of the crucial June 1 meetings at Norfolk and Richmond.[21] Three employees testified that William Edwards, a supervisor in the transportation department under Superintendent Bishop, stood across the street from places where C. I. O. meetings were being held observing those who entered. Jesse Smith, an employee in the Norfolk transportation division, testified that Edwards warned him that the employees would keep "messing with the C. I. O." until they lost their jobs. Raymond Hopkins, another Norfolk transportation employee, testified that Edwards came to him the day after he signed a C. I. O. card and warned him that he "wouldn't last long" if he did not "drop" the C. I. O. immediately. Hopkins and Robert E. Elliott both testified that early in June, Edwards, while in uniform, accosted them in a restaurant near the car barn and profanely accused them of "causing all of the trouble around here." When Hopkins and Elliott left the restaurant in an effort to avoid an argument, Edwards followed them into a restaurant across the street and con-

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[20] See Section D, *infra*.

[21] See Section D, *infra*.

tinued to harass them, asserting, "They are trying to put me and Mr. Bishop in the penitentiary but I am going to show them I am going to put them in the penitentiary." This testimony is fully confirmed by the testimony of a Norfolk city policeman who witnessed the incident. Edwards denied engaging in the conduct attributed to him by these employees, but we do not credit the denial, and accordingly find that Edwards engaged in surveillance and the other intimidatory conduct attributed to him.

Superintendent Bishop, too, engaged in various acts of unlawful interference. Preliminarily, it should be noted that the group of Norfolk transportation employees which had submitted to him the petition requesting a substantial increase in wages and certain improvements in hours and working conditions, held aloof from the movement to form an independent company-wide organization. Various members of this group testified to conversations with Superintendent Bishop after the movement to organize an unaffiliated system-wide organization had started. Three employees testified to the effect that Bishop urged that the group should "have something to do with the system-wide organization," that they should select their own lawyer to assist them in drafting a constitution and bylaws, and that they could do much better with such an organization than with an outside organization. Bishop denied having made any such suggestion to two of the three employees, but upon the entire record we find that Bishop made the suggestions and statements attributed to him by the three employees.

Robert E. Elliott, the leader of this group which was composed of a majority of the Norfolk transportation employees, went to Richmond on June 14 and sought to arrange a bargaining conference with President Holtzclaw. Holtzclaw refused to agree to such a conference, admittedly asserting that to deal with so small a group as the Norfolk transportation employees "would mean a chaotic condition in negotiations." Elliott testified that on his return from Richmond on June 15 Superintendent Bishop sought him out at his home and informed him that:

> 150 men have come to me in the last two or three days and told me that they want to hook up with this system-wide organization. • • •

Why don't you forget this transportation organization that is trying to be formed around here, and see what the men want to do. • • •
[fol. 109] Now, look, if you will swing the men into the company union or into this system-wide union, I am going to have a good job open in a few months. • • • If you will play ball with the company, I will see that you get that job.

Elliott further testified that several days later Bishop summoned him to his [Bishop's] home and talked with him at length concerning the respondent's activities. During the course of the conversation Bishop asserted, according to Elliott, that the "Company had an enormous surplus of money • • • and that they could fight organizations, and that they would fight organizations • • • This company usually gets what it wants." Elliott's testimony continued that after further discussion Bishop handed him a booklet describing the company-union plan in effect at the Colorado Fuel and Iron Company with the suggestion that he study it thoroughly, and told him that if an independent organization was formed he would see that Elliott was made chairman of it.

While denying most of the foregoing testimony Bishop did not make any effort to explain what he had said on the various occasions on which he admittedly had conversations with Elliott; nor did he deny giving Elliott the booklet on the company-union plan in effect at the Colorado Fuel and Iron Company. We find Elliott's complete and detailed statements as to how Bishop sought him out and as to what Bishop said to him on each of these occasions more persuasive than Bishop's bare denials and find that Bishop made the statements and engaged in the conduct attributed to him by Elliott.

C. *Conclusions with respect to the respondent's interference, restraint, and coercion and domination of the I. O. E.*

Upon the foregoing facts, we are of the opinion and find that the respondent has engaged in a course of conduct calculated to restrain and discourage its employees from self-organization in nationally affiliated unions and to divert and canalize their organizational efforts to the establish-

ment of a company-wide unaffiliated labor organization; that in its totality, the respondent's conduct has been coercive of its employees in the exercise of their right to self-organization, with the result that when they formed the I. O. E. they were not as free as the statute requires; that the I. O. E. is the fruit of the respondent's illegal interference with, and restraint and coercion of its employees; and that the respondent has dominated the formation and administration of the I. O. E., and has contributed financial and other support to it.[22]

As early as 1933, in a message purporting to enlighten the employees as to their right to organize, the respondent indicated its strong disapproval of their exercise of that right. The passage of the Act, far from modifying the respondent's hostility toward independent employees' self-organization, saw the continued employment by the respondent of an undercover operative to report on self-organiza-[fol. 110] tional efforts,[23] and attempts on the part of Superintendent Bishop, himself to discover and thwart incipient union movements by questioning employees concerning such matters.[24]

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[22] The respondent contends that the bulletin of April 26, 1937, and the messages of May 24, 1937, are unobjectionable expressions of opinion concerning matters of current interest to the employees, free from any element of interference, restraint, or coercion. As more fully discussed below, however, these messages may not be viewed separately and apart from the setting in which they occurred and without reference to their impact upon the employees because of the attendant circumstances. Taking into consideration these factors, these messages, whatever their significance when viewed standing alone, plainly cannot be regarded as mere expressions of the employer's opinion.

[23] See *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 598, enf'g *Matter of Link Belt Company* and *Steel Workers Organizing Committee*, 12 N. L. R. B. 854; *N. L. R. B.* v. *Fruehauf Trailer Co.*, 301 U. S. 49, 54, enf'g *Matter of Fruehauf Trailer Company* and *United Automobile Workers Federal Labor Union No.* 19375, 1 N. L. R. B. 68.

[24] See *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 518, enf'g *Matter of H. J. Heinz Company* and *Canning and Pickle Workers, Local Union No.* 325, 10 N. L. R. B. 963.

When employees' self-organization was given impetus by the decisions establishing the constitutionality of the Act, President Holtzclaw once more resorted to the device of "advising" the employees as to their "rights", in order to condition them against the free exercise thereof. In the posted bulletin of April 26, Holtzclaw paid lip-service to the right of self-organization, at the same time stressing the negative aspects of the Act, pointing out that "it is not at all necessary * * * to join any labor organization" and that "there is no law which requires * * * you to pay dues to or to join any organization," inveighing against the choice of a national union by contrasting the "strikes and unrest" which were said to accompany the organizing drives of national unions with the "happy relationship" which was alleged to have attended the 15 years' absence of national unions from among the employees, and concluding with an appeal to the employees "individually or as a group" "to deal directly with the Company" as "in the past,"[25] rather than through representatives, as contemplated by the Act.

The employees followed the course charted for them by the respondent, several groups submitting petitions requesting changes in existing wages, hours, and working conditions. The respondent abruptly decided that it had set the employees upon the wrong course, that dealing with these groups which had submitted petitions in response to its suggestions, led to "chaotic conditions." Accordingly, the respondent plotted a new course for the employees and took every precaution to see that the employees did not waver therefrom. The objective now was company-wide bargaining rather than the individual bargaining or group bargaining which the respondent had urged in its April 26 bulletin. To attach this objective, the respondent summoned all its employees to meet in groups and to select representatives to consider establishment of a plan of collective bargaining. The group meetings were called by the respondent without regard to the fact that a

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[25] See *N. L. R. B.* v. *Elkland Leather Co.*, 114 F. (2d) 221, 223-224 (C. C. A. 3), cert. denied 311 U. S. 705, ent'g *Matter of Elkland Leather Co., Inc.* and *National Leather Workers Association, Local No.* 37, 8 N. L. R. B. 519, and decisions cited in footnote 36, page 20, below.

majority of the employees had not yet determined the form of self-organization, if any, that they desired. Thereafter, the respondent called meetings of the representatives to be held at Norfolk and Richmond. The employee representatives attended pursuant to the call from the respondent and not as a result of any spontaneous desire of the employees for self-organization on a company-wide basis. At these two simultaneous conferences the respondent urged not only the formation of "a bargaining agency," but also the kind of bargaining agency which the employees were to form, namely, an organization confined to employees of the Company. They were not to join or affiliate with any "outside" organization. This is clear from the respondent's insistence on an organization of their *own*, with their *own* officers and adviser and their *own* bylaws and rules. [fol. 111] By pushing forward its plan the respondent prevented selection of representatives who were not employees of the respondent, although the Act specifically provides that employees must be free to choose such representatives. Moreover, the messages made it clear that the employees were limited to the formation of a company-wide organization. Shortly following the posting of the April 26 bulletin and at the behest of Superintendent Bishop, a large majority of the Norfolk transportation employees had organized into a group for collective bargaining.[26] Now, however, the messages stressed that the respondent could not deal with this and the other groups of employees which had submitted petitions; to do so was "not the logical procedure." To bargain "in an orderly manner" it was essential that the group bargained with should consist of all "similar operators"; in other words, "all interested groups should be represented in these discussions," as the messages specifically stated. Thus the respondent closed the door to voluntary self-organization and laid down the requirement that any employee organization must be on a company-

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[26] Superintendent Bishop, as noted above, sought to guide this group into channels he deemed desirable; he suggested that the men "form their own organization," and warned against the C. I. O. and other nationally affiliated organizations, characterizing them as "trouble makers" and asserting that the respondent would not recognize them.

wide basis.[27] In short, the respondent imposed its own preconceived pattern of organization upon the employees. President Holtzclaw's concluding promise in the message, that any wage increase granted would be made retroactive, was nicely calculated to spur the representatives zealously to carry out the respondent's proposal.[28] So too, by withdrawing from the meeting place and suggesting that the employee representatives remain for further discussion, the respondent's officials provided a medium ideally suited to the incubation of their plan. In such a setting, the respondent's bulletins and speeches were not mere expressions of opinion but constituted an integral part of the respondent's course of conduct designed to cause its employees to abandon their right to self-organization and to submit to the will of the respondent.

As a result, when the employee representatives reported the respondent's message, including its instruction to form

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[27] While the respondent's statements did not in so many words direct the employees to form a single company-wide organization, we are of the opinion that, from the language of the statements, the firm rejection of bargaining with smaller groups of employees, and the company-wide selection of representatives to compose the two audiences, the employees reasonably inferred that only through a company-wide organization could there be collective bargaining with the respondent and that the respondent expected them to evolve such a plan.

[28] *M. H. Ritzwoller Co.* v. *N. L. R. B.*, 114 F. (2d) 432, 435 (C. C. A. 7) enf'g *Matter of M. H. Ritzwoller Company* and *Cooper's International Union of North America, Local No. 28*, 15 N. L. R. B. 15; *N. L. R. B.* v. *Viking Pump Co.*, 113 F. (2d) 759, 760 (C. C. A. 8), cert. denied 312 U. S. 680, enf'g *Matter of Viking Pump Company* and *Steel Workers Organizing Committee*, 13 N. L. R. B. 576; *F. W. Woolworth Co.* v. *N. L. R. B.*, 121 F. (2d) 358, 660 (C. C. A. 2), enf'g *Matter of F. W. Woolworth Company et al.* and *United Wholesale & Warehouse Employees of New York, Local 65*, 25 N. L. R. B. 1362; *N. L. R. B.* v. *American Potash and Chemical Corp.*, 98 F. (2d) 488, 494 (C. C. A. 9), cert. denied, 306 U. S. 643, enf'g *Matter of American Potash & Chemical Corporation* and *Borax & Potash Workers Union No. 20181*, 3 N. L. R. B. 140.

their "own" organization, to the men in the various de- [fol. 112] partments,[29] the decision to form a company-wide unaffiliated organization quickly followed. Thereupon, the employee representatives, commissioned to bring the projected organization into being, repeatedly met on company time and property without objection from the respondent, and sought and received from the respondent detailed information as to respondent's operations and personnel. The respondent thus gave material assistance to the organization of the I. O. E. during its critical formative period,[30]

At the same time, the respondent continued its interference with the activities of adherents of affiliated unions, as is evidenced by the sudden discharge of Everard N. Mann, an open advocate of C. I. O. affiliation, on the eve of the important June 1 meeting,[31] by the activity of Supervisor Edwards in maintaining surveillance of C. I. O. meetings and threatening C. I. O. supporters with discharge, and by the statement of Superintendent Bishop, made at a time when he was seeking to induce employees to cooperate in the plan for an unaffiliated, company-wide organization, that the respondent would "fight" affiliated organizations.

We are of the opinion and find that the success of I. O. E. organizers in securing the signatures of a majority of the respondent's 3,000 widely scattered employees within 2 weeks after the new organization was formally launched,

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[29] In some departments, as we have found, the meetings at which the employee representatives reported were held with the active cooperation of the respondent's supervisory officials.

[30] See *Western Union Telegraph Company* v. *N. L. R. B.*, 113 F. (2d) 992, 995 (C. C. A. 2), enf'g *Matter of Western Union Telegraph Company* and *American Communications Association*, 17 N. L. R. B. 34; cf. *Kansas City Power and Light Company* v. *N. L. R. B.*, 111 F. (2d) 340, 349 (C. C. A. 8), enf'g as modified *Matter of Kansas City Power & Light Company* and *International Brotherhood of Electrical Workers*, 12 N. L. R. B. 1414; *N. L. R. B.* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 870 (C. C. A. 5), cert. denied 310 U. S. 651, enf'g *Matter of Brown Paper Mill Company, Inc.* and *International Brotherhood of Paper Makers*, 12 N. L. R. B. 60.

[31] Mann's discharge is discussed in Section D, *infra*.

must be attributed in large part to the respondent's sponsorship of and assistance to the I. O. E. and its persistent and well-known opposition to national unions.

Finally, we have considered the promptness with which the respondent agreed to grant the I. O. E. a check-off of dues and a closed shop. This constituted a complete reversal of attitude. When it had been a question of the employees joining a nationally affiliated union, the respondent, in its April 26 bulletin, expressed opposition toward the closed shop and the check-off. At the hearing, too, the respondent's officials expressed strong opposition to the closed shop in principle. Yet when the I. O. E. sought the check-off, the respondent at once agreed, and, after a comparatively few hours discussion on July 30 and 31, 1937, acquiesced in the demand of the I. O. E. for a closed shop. The result was that all of the respondent's employees were forced to join and pay dues to the I. O. E. or lose their jobs. We are persuaded, and find, that the respondent agreed to the closed shop and the check-off of I. O. E. dues in order to entrench the I. O. E. among the employees and to insure its financial stability.

We turn to an evaluation of defenses asserted by the respondent. The respondent contends, with respect to its employment of an undercover operative to report on the organization activities of the Norfolk employees, that reporting on such matters was not the primary responsibility of this operative, that he had not in fact submitted any reports on labor matters since 1934, and that in these circumstances no significance should be attached to the use of his services. Assuming that the operative did not submit [fol. 113] any reports on labor matters after the passage of the Act,[32] the respondent nevertheless continued after the passage of the Act to employ an undercover operative to

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[32] T. Norman Jones, a vice president of the respondent and a witness for the respondent, testified on direct examination that he had heard that a report was received from this operative in March 1937 to the effect that someone was planning to organize the men at the Reeves Avenue Power Station. On cross-examination he testified that he was "uncertain" about the matter and did "not wish to swear" that the information which he received was obtained through the undercover operative.

report on incipient union activities among the Norfolk employees—an operative who by posing as an ardent supporter of organized labor had insinuated himself into a strategic position to uncover any movement to organize the respondent's employees. In so doing the respondent engaged in an unfair labor practice, irrespective of whether the employees were aware of this operative's activities. Our experience establishes that employers resort to labor espionage for the purpose of obstructing and destroying self-organization.[33] To be effective it must necessarily be secret; it is nonetheless effective in restraining the employees in the exercise of their rights under the Act on this account.[34] We find that the respondent, by employing an undercover operative to report on the organizational activities of its Norfolk employees and by questioning employees suspected of engaging in union activities as to such matters, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

As regards the April 26 bulletin, we are not unmindful of the respondent's argument that its reference to the employees' right to join the union of their choice and its statement that no employee would suffer because of his membership, assured the employees of its impartiality, and that hence the employees could not have been restrained in their choice of representatives by any statement contained in the bulletin. We do not agree, however, that the respondent's brief reference to the employees' rights under the Act ren-

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[33] The conclusions of the LaFollette Committee concerning industrial espionage fully confirm the Board's experience. Sen. Rep. No. 46, Part 3, 75th Cong., 2nd Sess., pp. 8-9.

[34] *Bethlehem Steel Company* v. *N. L. R. B.*, 120 F. (2d) 641, 647 (App. D. C.), enf'g *Matter of Bethlehem Steel Corporation et al.* and *Steel Workers Organizing Committee*, 14 N. L. R. B. 539; *N. L. R. B.* v. *Baldwin Locomotive Works*, 128 F. (2d) 39, 50 (C. C. A. 3), enf'g *Matter of The Baldwin Locomotive Works* and *Steel Workers Organizing Committee*, 20 N. L. R. B. 1100; *N. L. R. B.* v. *Grower-Shipper Vegetable Association*, 122 F. (2d) 368, 376 (C. C. A. 9), enf'g in this respect *Matter of Grower-Shipper Vegetable Association et al.* and *Fruit and Vegetable Workers Union of California, No. 18211*, 15 N. L. R. B. 322.

dered the employees wholly free with respect to joining unions. On the contrary, in view of the respondent's past hostility to labor organizations, and in view of the timing of the bulletin, after nationally affiliated organizations had attempted to organize the employees and at a time when the Supreme Court decisions sustaining the validity of the Act rendered further attempts imminent, we believe that the employees could not fail to be discouraged from joining "national" labor organizations by the respondent's action in posting the bulletin, which, as a whole, so clearly showed the respondent's opposition to their taking such a step. The respondent's subsequent activities, including its successful effort to effect the formation of a company-wide organization and the discharge of Mann because of his opposition to such an organization,[35] cast revealing light on the respondent's motives in posting the bulletin. Viewing the bulletin in the light of the background in which it was posted [fol. 114] and the respondent's subsequent activities, we find the bulletin clearly coercive. We accordingly find that the posting of the bulletin was an integral part of the respondent's conduct, and as such, interfered with, restrained, and coerced the respondent's employees in the exercise of the rights guaranteed in Section 7 of the Act.[36]

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[35] Mann's discharge is discussed in Section D below.

[36] See *N. L. R. B.* v. *Elkland Leather Co.*, 114 F. (2d) 221, 223-224 (C. C. A. 3), cert. denied 311 U. S. 705, enf'g *Matter of Elkland Leather Co., Inc.* and *National Leather Workers Associated Local No. 37*, 8 N. L. R. B. 519; *Valley Mould & Iron Corp.* v. *N. L. R. B.*, 116 F. (2d) 760, 766 (C. C. A. 7), cert. denied 313 U. S. 590, enf'g *Matter of Valley Mould and Iron Corporation* and *Steel Workers Organizing Committee*, 20 N. L. R. B. 211; *American Enka Corp.* v. *N. L. R. B.*, 119 F. (2d) 60, 62-63 (C. C. A. 4), enf'g *Matter of American Enka Corporation* and *Textile Workers Union No. 22129*, 27 N. L. R. B. 1057; *N. L. R. R. B.* v. *Blossom Products Corp.*, 121 F. (2d) 260, 261-262 (C. C. A. 3), enf'g *Matter of Blossom Products Corporation* and *International Ladies Garment Workers Union*, 20 N. L. R. B. 335; *N. L. R. B.* v. *Peter Pan Company of Winchester, Inc.*, decided June 1, 1942, 10 L. R. R. 494, enf'g *Matter of Peter Pan Company, Inc. et al.* and *United Garment Workers of*

The respondent contends that it arranged the May 24 meetings to point out to the employees the impracticability of bargaining separately with each small group which might desire a change in existing wages, hours, and working conditions, and to give them an opportunity to decide whether they desired to organize on a basis which would render bargaining feasible. The employees have the right, however, to organize upon any basis they see fit; they are not required to organize upon the particular basis that suits the convenience of the employer. The respondent in advising the employees' representatives that bargaining by "various departments and various occupations" was "not the logical procedure," and that "all interested groups should be represented in the discussions," encroached upon a field of activity reserved exclusively to employees.[37] Moreover, the respondent in the May 24 message urged the employees in so many words to proceed with "the formation of a bargaining agency," not any bargaining agency as the respondent contends, but a company-wide unaffiliated organization, as we have found. For these reasons the contention that the respondent at the May 24 meeting merely gave the employees the opportunity to decide whether or not they wanted to bargain must be rejected.

The respondent further contends that since it included in the message a statement of the employees' rights under the Act and declared that no employee would be discriminated against because of his choice of unions, any suggestion that it might have made in the message that the employees form a company-wide organization could not have impaired the employees' free choice of representatives. We cannot agree that the message left the employees the complete and unfettered freedom of choice of representatives contemplated by the Act. Evaluating the message as a whole

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America, 21 N. L. R. B. 522, 535-537, 540-543; compare the "Sasser statement" in *System Federation No. 40* v. *Virginian Ry. Co.*, 11 F. (2d) 621, 624-625, 633, aff'd 84 F. (2d) 641 (C. C. A. 4), aff'd 300 U. S. 515.

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[37] Cf. *Corning Glass Works* v. *N. L. R. B.*, 118 F. (2d) 625 (C. C. A. 2), enf'g *Matter of Corning Glass Works Macbeth-Evans Division* and *Federation of Flat Glass Workers of America*, 15 N. L. R. B. 598.

in light of the respondent's long-standing opposition to the organization of the employees, the anti-union activities of Superintendent Bishop, the bulletin of April 26 appealing to the employees to ignore the overtures of the organizers of nationally affiliated organizations, the discharge of Mann for advocating affiliation with a "national" union,[38] [fol. 115] and the respondent's subsequent support of the proponents of the I. O. E. and interference with the activities of the adherents of nationally affiliated organizations, and giving due regard to the sensitivity of employees to even subtle expressions of preference on the part of their employers,[39] we find that the respondent, in urging upon the employee representatives the formation of a bargaining agency of their "own," impaired the employees' free choice of representatives, notwithstanding the respondent's reference in the message to the employees' rights under the Act.

Upon all the facts, we are convinced and find that the May 24 meetings were arranged and the respondent's message to the employees was prepared for the purpose of bringing about the formation of a company-wide unaffiliated organization. The messages themselves contain, as we have found above, a thinly disguised plea for the formation of just such an organization. Had not the respondent been determined to effect the formation of such an organization there would have been no lawful occasion for the respondent's arranging the May 24 meetings as it did, for it had only recently "advised" the employees concerning their rights under the Act. The whole procedure of the

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[38] See Section D below.

[39] *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 78, aff'g 110 F. (2d) 29 (App. D. C.), enf'g *Matter of The Serrick Corporation* and *International Union, United Automobile Workers of America, Local No. 459*, 8 N. L. R. B. 621; *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 598-599, enf'g *Matter of Link-Belt Company* and *Steel Workers Organizing Committee*, 12 N. L. R. B. 854; N. L. R. B. v. *Virginia Electric and Power Company*, 314 U. S. 469, 477, remanding 115 F. (2d) 414 (C. C. A. 4), reversing *Matter of Virginia Electric & Power Company* and *Transport Workers Union of America, et al.*, 20 N. L. R. B. 911.

May 24 meetings was obviously chosen with a view to facilitating the formation of the desired organization. Not satisfied with the bulletin board method of transmitting messages to the employees, which the respondent had utilized in the past, this time the respondent delivered its message personally to representatives of the employees chosen at the respondent's behest. This strategy enabled the respondent to obtain a spokesman for its project in almost every department. The device of withdrawing from the meeting places and suggesting that the employee representatives remain for further discussion, we believe was intended to give them an opportunity to formulate their plans before consulting with their constituents and thus to expedite the formation of an organization.[40] We conclude, therefore, that the respondent arranged the meetings and urged upon the employees the formation of a company-wide unaffiliated organization because it feared the course the employees might pursue if the respondent did not intervene, that the respondent did so in a further effort to control the exercise by its employees of their right to self-organization, and that in doing so the respondent injected itself into a sphere of activity reserved exclusively to its employees and thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

As regards the respondent's assistance to the I. O. E. during its formative stage, we are not impressed by the respondent's contention that it had no knowledge that the meetings of the committees were being held on its premises. [fol. 116] We think it very unlikely that sizeable groups of employees could have met after the close of business on

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[40] The effectiveness of this strategy is shown by the fact that the the employee representatives at the May 24 meetings were largely responsible for the formation of the I. O. E., although prior to May 24 they had not, for the most part, even considered the necessity of forming a labor organization. Not only did the employee representatives constitute a large majority of the preliminary steering committees, but 8 of 10 members of the general committee, the governing body of the I. O. E., were May 24 representatives, as were 18 of the 27 representatives elected by the various voting sections of the I. O. E.

seven or more occasions in the respondent's buildings, buildings in which the employees for the most part were not employed, without this fact becoming known at least to persons whose duty it was to report such unusual occurrences to responsible supervisory officials of the respondent. In addition, on May 28 and 29 copies of local newspapers at Norfolk, introduced into evidence by the respondent, reported meetings of employees at which they decided to form an unaffiliated organization and also announced the meeting to be held in the respondent's office building on June 1. Despite this advance notice that the Norfolk employees proposed to use its property for the purpose of forming a labor organization, the respondent made no objection when the Norfolk employees met on its property, not only on June 1 but also on June 7 and 11 as well. In view of these circumstances, we find that the respondent gave tacit, if not express, consent to the use of its premises. The respondent's acquiescence in the repeated use of its premises for organizational meetings of the I. O. E., particularly when contrasted with respondent's attitude towards the use of company time and property by organizers for "national" unions, not only facilitated the efforts of the I. O. E. organizers to form the organization but also constituted a concrete demonstration of the respondent's approval of the project.[41]

We must reject the respondent's contention that no significance should be attached to the use of its premises by the I. O. E. organizers because it occurred only "in the initial groping for some plan of organization." It is dur-

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[41] *N. L. R. B.* v. *Bradford Dyeing Association*, 310 U. S. 318, 333, 335, 336, enf'g *Matter of Bradford Dyeing Association (U. S. A.)* and *Textile Workers Organizing Committee*, 4 N. L. R. B. 604; *Titan Metal Mfg. Co.* v. *N. L. R. B.*, 106 F. (2d) 254, 257, 258, 262 (C. C. A. 3), cert. denied 308 U. S. 615, enf'g *Matter of Titan Metal Manufacturing Company* and *Federal Labor Union No. 19981*, 5 N. L. R. B. 577; *New Idea, Inc.* v. *N. L. R. B.*, 117 F. (2d) 517, 521, 523-524 (C. C. A. 7), enf'g *Matter of New Idea, Inc.* and *International Association of Machinists et al.*, 21 N. L. R. B. 223; *N. L. R. B.* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 870 (C. C. A. 5), cert. denied 310 U. S. 651, enf'g *Matter of Brown Paper Mill Company, Inc.* and *International Brotherhood of Paper Makers*, 12 N. L. R. B. 60.

ing this period that that employer support is most effective. Once an organization is formally established, it can often continue to function, without employer support. During the critical formative stage, however, particularly where the proponents of the organization are acting, as in this case, not upon their own iniative but in response to the urgings of their employer, employer support is extremely vital. We find that the respondent's support of the I. O. E. organizers during "the initial groping" period contributed materially to the success of the I. O. E. organizers in bringing about the formation of that organization.[42]

Upon all the facts summarized above, we conclude that the I. O. E. was not the result of the employees' free choice; that it was initiated in response to the urgings of the respondent at the May 24 meetings to set up their "own" [fol. 117] organization; that the respondent's support of the organization during the critical formative period and its consistent opposition to nationally affiliated organizations are largely responsible for the adherence of the employees to the organization; and that the contract with the I. O. E. granting a closed shop and the check-off of the I. O. E. dues marked the climax of the respondent's efforts to erect an unaffiliated organization as a bulwark against nationally affiliated organizations. We find that the respondent has dominated and interfered with the formation and administration of the I. O. E. and has contributed support to it, and has in this and the other respects set forth above interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

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[42] See *Western Union Telegraph Company* v. *N. L. R. B.*, 113 F. (2d) 992, 995 (C. C. A. 2), enf'g *Matter of Western Union Telegraph Company* and *American Communications Association*, 17 N. L. R. B. 34; cf. *Kansas City Power and Light Company* v. *N. L. R. B.*, 111 F. (2d) 340, 349 (C. C. A. 8), enf'g as modified *Matter of Kansas City Power & Light Company* and *International Brotherhood of Electrical Workers*, 12 N. L. R. B. 1414; *N. L. R. B.* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 870 (C. C. A. 5), cert. denied 310 U. S. 651, enf'g *Matter of Brown Paper Mill Company, Inc.* and *International Brotherhood of Paper Makers*, 12 N. L. R. B. 60.

D. *Discriminatory discharges and lay-offs*

Joseph Bolton. Bolton was employed by the respondent in September 1926 as a bus operator in the Norfolk division. He was discharged on January 13, 1938. In his Intermediate Report the Trial Examiner found that the respondent's discharge of Bolton was not discriminatory and recommended that the complaint as to him be dismissed. The Amalgamated, which had filed the charges as to Bolton, filed no exceptions to the Intermediate Report. We have examined the record with respect to Bolton and we agree with the Trial Examiner's finding. We shall accordingly dismiss the complaint insofar as it alleges that by discharging Bolton the respondent discriminated in regard to his hire and tenure of employment.

Everard M. Mann. Mann was employed by the respondent as a street car operator in Norfolk on July 29, 1936. As we have heretofore noted, at one of the meetings of Norfolk transportation employees held on May 11, 1937, on the respondent's premises at Superintendent Bishop's suggestion, Mann protested vigorously against the formation of an inside union, advocated that the employees affiliate with either the C. I. O. or the Amalgamated, and stated that he preferred the C. I. O., which he joined shortly after the meeting. Thereafter he continued to urge his fellow employees to join a union having national affiliation. On May 27, 1937, Mann, who had spoken to Bishop a few days earlier with reference to obtaining a personal loan of $50 from the respondent, walked into the dispatcher's office at Norfolk and, unaware that Superintendent Bishop was there, loudly inquired, "Has anybody seen this guy Bishop?" Bishop, who was in the office reading a newspaper, lowered it, and the dispatcher said, "Mr. Bishop is sitting right over there." Mann looked at Bishop, but said nothing and walked out. On June 1, the day upon which meetings were scheduled to be held at both Richmond and Norfolk to lay plans for the formation of an unaffiliated organization, Bishop discharged Mann, on the ground that he had been disrespectful to him. Bishop testified that he was embarrassed by Mann's disrespectful reference to him in the presence of other employees, and that he discharged him on this account after consulting with Vice-President Throckmorton. Bishop also testified that Mann

had a poor accident record, but stated that this was not the immediate cause of his discharge. Mann's accident record, while not good, was admittedly better than those of many operators retained by the respondent in its employ.

We are of the opinion that Mann was discharged because of his union activities and not because of the incident relied upon by Bishop. As stated above, Mann was one of the first employees to take a firm stand against an unaffiliated organization and to advocate affiliation with a national union. Bishop's opposition to affiliated organizations is clear, not only from his action in seeking out employees and questioning them concerning union matters each time [fol. 118] he suspected them of attempting to organize,[43] but from his blunt statements to the effect that unions were "no good," that they were nothing but "trouble makers," and that the respondent would fight them to the limit. We are convinced, upon the entire record, that Bishop seized upon the incident of May 27 as a pretext to get rid of Mann, and that it was intended as a warning to those employees also favoring affiliation with a national organization as to what the future held in store for them. Although Bishop stated that he had no knowledge of Mann's union activity, Warren Bishop, his son, was present throughout the May 11 meeting at which Mann spoke. Bishop denied that he had ever obtained any information regarding the labor activities of the employees from his son, or that he had discharged Mann for his union activity, but offered no explanation why Warren Bishop, who was not an employee of the respondent, was present at the meeting. In view of Bishop's demonstrated antagonism to affiliated organizations, we do not find his denials convincing.

We find that, by discharging Everard M. Mann, the respondent discriminated in regard to his hire and tenure of employment, thereby discouraging membership in the T. W. U., and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

A. F. Staunton and Robert E. Elliott, Jr. Staunton, a first-class lineman in the Norfolk distributing department,

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[43] Bishop, it should be noted, is the supervisory employee to whom Undercover Operative Walters submitted his report on labor activities.

and Elliott, a bus operator in the Norfolk transportation department, were discharged on November 4, 1937, because of their refusal to join the I. O. E. November 4, 1937, marked the end of the 90-day period which employees were given to join the I. O. E. under the closed-shop provision of the contract with that organization. The respondent defends these discharges principally upon the ground that they were required by the closed-shop provision of the contract with the I. O. E., which the respondent contends comes within the proviso of Section 8 (3) of the Act permitting employees to enter into such contracts with unassisted labor organizations representing a majority of the employees in appropriate bargaining units. However, in view of our findings as to the respondent's interference with, and domination and support of the I. O. E., that organization obviously cannot qualify as an organization not assisted by unfair labor practices; the closed-shop provision therefore is invalid, and Staunton's and Elliott's discharges necessarily fall within the ban of the Act.

The respondent further argues that Staunton was not discharged, but voluntarily chose to leave the respondent's employ. The record shows, however, that Staunton reported for work on November 4, as usual, but was not permitted to go to work by Superintendent of Distribution Crafton, who informed him that no one could go to work who was not a member of the I. O. E. Staunton refused to join, asserting, according to Crafton, that he would quit before he would sign up. It is thus apparent that Crafton conditioned Staunton's going to work upon his joining the I. O. E., a condition which, in view of our findings as to the invalidity of the closed-shop provision, he could not lawfully impose. We find that Staunton was not obliged to work subject to this illegal condition, and that Crafton's action in imposing this condition was tantamount to discharging him.

We find that the respondent discharged A. F. Staunton and Robert E. Elliott, Jr., because of their refusal to join the I. O. E., thereby discriminating in regard to hire and tenure of employment, encouraging membership in the I. O. E., and discouraging membership in the I. B. E. W. and T. W. U., of which they were active members, and thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

[fol. 119] *J. L. Judge and T. N. Harrell, Jr.* In the spring of 1938 the respondent practically completed an extensive rural electrification program upon which it had been engaged since 1936, necessitating a reduction in the number of employees in the distribution department. On March 31, 1938, 13 employees in the Norfolk distribution department were laid off, including Judge, a second-class lineman, and Harrell, a third-class lineman. The factors which the respondent took into consideration in selecting the employees to be laid off, according to William T. Crafton, the superintendent of the Norfolk distribution department in charge of personnel matters, were, "First, seniority; second, their ability; and third, their dependents."

Both Judge and Harrell were employed in April 1936 as temporary lineman's helpers, both received several wage increases in 1937, and both were reclassified as third-class linemen. On November 1, 1937, Judge was reclassified as a second-class lineman. Of the second-class linemen, Judge had the least seniority, having been with the respondent only since April 1936. The next youngest second-class lineman had been with the respondent almost 3 years longer than Judge. Of the 10 third-class linemen in the respondent's employ on March 31, 1938, Harrell had been with the respondent longer than 5 of them. All of these 5 employees were retained when Harrell was laid off.

Judge and Harrell were charter members of the I. B. E. W. which initiated organizing activities among the Norfolk distribution employees in June 1937. In August Judge was elected financial secretary and treasurer of the organization. Both employees were vigorous opponents of the I. O. E. and sought to expose the weaknesses of the organization; both at the time of their lay-offs were engaged in a campaign to build up the I. B. E. W. among the employees. Their membership in that organization was known to the respondent, Superintendent of Distribution Crafton having ordered Judge and Staunton to remove an I. B. E. W. notice, signed by them, from the respondent's bulletin board, and General Foreman May having been informed by Harrell of the fact that he had joined the I. B. E. W. shortly after he joined the organization.

The respondent contends that Judge was chosen to be laid off because he had the least seniority of any of the second-class linemen. Since it appears that Judge did have considerably less seniority than any other of the second-

class linemen, and since seniority was a factor to which the respondent uniformly gave weight in determining employees to be laid off, we are not persuaded that his union membership and activities were the cause of his selection to be laid off, although he was an able worker whose advancement had been exceptionally rapid.

The respondent urges that Harrell was selected to be laid off because he was continually becoming embroiled in altercations both with his fellow employees and with his supervisors. The respondent cites several instances of such altercations. Harrell himself made no attempt to conceal that he was rather hot-headed. We think it not unreasonable, in view of Harrell's quarrelsome disposition, that the respondent would select him to be laid off when a general reduction in force became necessary, particularly since there was little difference in seniority among the third-class linemen and all had been reclassified as third-class linemen on the same day. Moreover, at the time Harrell was laid off the respondent's relations with its employees were under the scrutiny of a representative of the Board in connection with the charges of domination which had been filed. This was scarcely an opportune time for the respondent to resort to anti-union discrimination.

We find that the respondent by laying off J. L. Judge and T. N. Harrell, Jr., did not discriminate in regard to their hire or tenure of employment, and we shall dismiss the allegations of the complaint with respect thereto.

[fol. 120] IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the respondent set forth in Section III, above, occurring in connection with the operations of the respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, commerce, transportation, and communication among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the respondent has engaged in unfair labor practices, we shall order that it cease and desist therefrom and that it take certain affirmative action which will effectuate the policies of the Act.

We have found that the respondent has dominated and interfered with the formation and administration of the I. O. E. and has contributed support to it. In order to effectuate the policies of the Act and free the employees of the respondent from such domination and interference, and the effects thereof, which constitute a continuing obstacle to the exercise by the employees of the rights guaranteed them by the Act, we shall order the respondent to withdraw all recognition from the I. O. E. as the representative of any of the respondent's employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of employment, and completely to disestablish it as such representative.[44]

Having found that the respondent entered into an invalid contract with the company-dominated I. O. E. providing for a closed shop and the deduction of I. O. E. dues from the employees' wages in a final effort to bulwark itself against nationally affiliated organizations, we shall order the respondent to cease and desist from giving effect to the said contract or to any extension, renewal, modification, or supplement thereof, or any successor contract with the I. O. E. which may now be in force. Nothing in this Decision or in our Order should be taken, however, to require the respondent to vary those wages, hours, and other substantive features of its relations with the employees themselves, if any, which the respondent established in the performance of such contract as extended, renewed, modified, supplemented, or superseded.[45]

We are of the opinion that, under the circumstances of this case, the respondent should be ordered to reimburse each employee for any amounts which the respondent has deducted from his wages for dues and assessments in the I. O. E. The respondent concluded a closed-shop contract with the I. O. E., a company-dominated organization, thus compelling its employees to become and remain members

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[44] See *N. L. R. B.* v. *Newport News Shipbuilding and Dry Dock Corporation*, 308 U. S. 241; *N. L. R. B.* v. *The Falk Corporation*, 308 U. S. 453; *N. L. R. B.* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261.

[45] See *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 365-367.

of the illegal organization. Employees were in fact discharged because they refused to join the I. O. E. The check-off provision, a device by which the respondent assured the financial stability of the company-dominated organization, could no more be avoided by the employees than could the compulsory membership requirement. The bylaws of the I. O. E. required its members to execute check-off authorizations under penalty of being dropped from membership in the I. O. E., and thereby, under the [fol. 121] closed-shop provision, from their jobs. We find that the monies thus deducted from the wages of the employees constituted the price of retaining their jobs, a price coerced from them for respondent's purpose of supporting and maintaining the organization which respondent had dominated in order to thwart bona fide representation. We further find that, as a result of the imposition of the illegal closed-shop and check-off requirements, the employees suffered a definite loss and deprivation of wages equal to the amounts deducted from their wages and paid over to the I. O. E. It is appropriate that the employees be made whole by reimbursement of amounts exacted from them for illegal purposes. We find that in these circumstances,[46] the effects of the unfair labor practices may be fully remedied and the purposes and policies of the Act may be completely effectuated only by restoring the *status quo*. Hence, we shall order the respondent to reimburse its employees for the amounts deducted from their wages for dues and assessments in the I. O. E.

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[46] The propriety of an order requiring reimbursement of dues deducted from wages depends upon the particular circumstances of the case. In the particular circumstances of this case we regard the dues reimbursement requirement peculiarly "adapted to the situation which calls for redress." *N. L. R. B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348. Cf. *Matter of Abraham B. Karron, doing business as Pennsylvania Handbag Frames Manufacturing Company* and *Local 1224, United Electrical, Radio, and Machine Workers of America*, 41 N. L. R. B. 1454, 1469; *Matter of Ohio Valley Bus Company* and *Division 1171, Amalgamated Association of Street, Electrical Railway & Motor Coach Employees of America*, 38 N. L. R. B. 838, 862, note 27.

Having found that the discharge of Everard M. Mann and A. F. Staunton were unfair labor practices we shall direct the respondent to reinstate each of them to his former position, without prejudice to his seniority, or other rights and privileges. We shall further order the respondent to make whole Mann and Staunton for any loss of pay they may have suffered by reason of the respondent's discrimination against them by payment to each of them of a sum of money equal to the amount which he normally would have earned as wages from the date of his discharge to the date of the respondent's offer of reinstatement, less his net earnings.[47]

Although finding that Staunton had been discharged in violation of the Act the Trial Examiner did not recommend his reinstatement upon the grounds that he subsequently obtained regular and substantially equivalent employment. We are of the opinion, for reasons which we have heretofore set forth,[48] that regardless of whether Staunton obtained regular and substantially equivalent employment subsequent to his discharge his reinstatement is an appropriate means of effectuating the policies of the Act. We consequently find it unnecessary to pass upon the question of [fol. 122] whether or not Staunton's subsequent employment was regular and substantially equivalent. Since, however, the respondent could not have been expected to offer

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[47] By "net earnings" is meant earnings less expenses such as transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company* and *United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590*, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, and other work-relief projects shall be considered as earnings. See *Republic Steel Corporation* v. *N. L. R. B.*, 311 U. S. 7.

[48] See *Matter of Ford Motor Company* and *International Union, United Automobile Workers of America, Local Union No. 249*, 31 N. L. R. B. 994, 1099-1100; *Phelps Dodge Corporation* v. *N. L. R. B.*, 313 U. S. 177.

Staunton reinstatement during the period the Trial Examiner's Intermediate Report was outstanding, we shall direct that the period from the date of the Intermediate Report to the date of our original Decision and Order herein be excluded in the computation of back pay due him.

Having also found that the lay-off of Robert E. Elliott, Jr., was an unfair labor practice we would normally order his reinstatement with back pay. The respondent, however, has adduced convincing evidence that the normal remedy of reinstatement with back pay should be withheld in Elliott's case. On April 12, 1937, a Monday (the day upon which the weekly passes are sold) Elliott had an accident in which over $100 of the respondent's money disappeared. On November 1, 1937, also a Monday, and but 2 days before the deadline for joining the I. O. E. under the respondent's contract with the organization, Elliott had a second accident in which he reported losing $75 of the respondent's money. He never reported for work after this accident and was discharged on November 4, 1937, for failing to join the I. O. E. as required by the respondent's contract with that organization. The respondent's physician, who examined Elliott on the day after the accident reported that he could observe no objective symptoms of any injury and it appears that Elliott was not confined to his bed by his injury. The respondent was unable to locate any of the persons named as witnesses to the accident by Elliott. Raymond G. Carroll, the manager of the Norfolk transportation department, testified that after investigation he concluded that the report was a misrepresentation and that the respondent on November 6, a regular pay day, declined Elliott's request for his past 2 weeks' pay pending a final determination of the matter. Elliott filed a suit for his back wages against the respondent in the Civil Justice Court of the city of Norfolk which the respondent resisted by filing a plea of set-off. This suit had not been brought to trial at the time of the hearing in the case and the respondent has not, so far as appears in the record, paid Elliott his final wages. Subsequently Elliott filed a claim for compensation with the Industrial Commission of Virginia. The opinion of

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[49] This opinion was not before us when we handed down our original decision herein.

the Commission dated December 22, 1938,[49] of which we take judicial notice, recites as follows:

The claimant recites the fact that he had an accident but further did not produce any witnesses to same. The defendant showed by preponderance of evidence that the accident did not occur. The burden of proof is upon the claimant to make his claim and as he has failed to do so, this claim is dismissed.

Thus it appears that from the time it first had an opportunity to investigate Elliott's November 1, 1937, accident the respondent has been of the conviction that Elliott falsely reported losing the respondent's money. It further appears that the respondent has acted pursuant to conviction, not only by refusing to pay Elliott his final wages when they were due, but by defending its position in every tribunal to which Elliott took his case. While we do not find that Elliott falsely reported losing respondent's funds, nevertheless, in this situation we do not think that it would effectuate the policies of the Act to require the respondent to restore Elliott to his former position. We shall, therefore, not require Elliott's reinstatement with back pay.

The respondent's entire course of conduct, including its many and varied forms of interference, restraint, and coercion, its domination and support of the I. O. E., and its [fol. 123] discriminatory discharges discloses a fixed purpose on the part of respondent to defeat self-organization and its objects. Because of the respondent's unlawful conduct in the past and its underlying purpose we are convinced that there is a danger of the respondent engaging in other related unfair labor practices prescribed by the Act in the future. The preventive purpose of the Act will be thwarted unless our order is coextensive with the threat. In order, therefore, to make effective the interdependent guarantees of Section 7, to prevent a recurrence of unfair labor practices, and thereby to minimize strife which burdens and obstructs commerce, and thus effectuate the policies of the Act, we shall order the respondent to cease and desist from in any manner infringing the rights guaranteed in Section 7 of the Act.

Upon the basis of the above findings of fact, and upon the entire record in the case, the Board makes the following:

Conclusions of Law

1. Transport Workers Union of America, Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America, International Brotherhood of Electrical Workers, and The Independent Organization of Employees of Virginia Electric and Power Company, are labor organizations within the meaning of Section 2 (5) of the Act.

2. By dominating and interfering with the formation and administration of The Independent Organization of Employees of Virginia Electric and Power Company, and contributing support to it, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (2) of the Act.

3. By discriminating in regard to the hire and tenure of employment of Everard M. Mann, Robert E. Elliott, Jr., and A. F. Staunton; and thereby discouraging membership in Transport Workers Union of America, Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America, and International Brotherhood of Electrical Workers, and encouraging membership in The Independent Organization of Employees of Virginia Electric and Power Company, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (3) of the Act.

4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

6. By discharging Joseph Bolton and laying off J. L. Judge and T. N. Harrell, Jr., the respondent has not engaged in unfair labor practices within the meaning of Section 8 (3) of the Act.

Order

On the basis of the above findings of fact and conclusions of law and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board

hereby orders that the respondent, Virginia Electric and Power Company, Richmond, Virginia, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Dominating or interfering with the formation and administration of The Independent Organization of Em- [fol. 124] ployees of Virginia Electric and Power Company, or the formation or administration of any other labor organization of its employees, or contributing support to The Independent Organization of Employees of Virginia Electric and Power Company, or any other labor organization of its employees;

(b) Giving effect to its contract heretofore described with The Independent Organization of Employees of Virginia Electric and Power Company, or to any extension, renewal, modification, or supplement thereof, or to any successor contract with The Independent Organization of Employees of Virginia Electric and Power Company which may now be in force;

(c) Discouraging membership in Transport Workers Union of America; Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America; International Brotherhood of Electrical Workers, or any other labor organization of its employees, or encouraging membership in The Independent Organization of Employees of Virginia Electric and Power Company, or any other labor organization of its employees, by discharging, laying off, or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire and tenure of employment;

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purposes of collective bargaining and other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Withdraw all recogniti n from The Independent Organization of Employees of Virginia Electric and Power

Company as the representative of any of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of employment, and completely disestablish The Independent Organization of Employees of Virginia Electric and Power Company as such representative;

(b) Offer to Everard M. Mann and A. F. Staunton immediate and full reinstatement to their former positions without prejudice to their seniority and other rights and privileges;

(c) Make whole Everard M. Mann for any loss of pay he may have suffered by reason of the respondent's discrimination against him by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of his discharge or lay-off to the date of the offer of reinstatement, less his net earnings during said period;

(d) Make whole A. F. Staunton, for any loss of pay he may have suffered by reason of the respondent's discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned from the date of his discharge to September 13, 1938, the date of the Intermediate Report, and from February 27, 1940, the date of our original Decision and Order, to the date of the respondent's offer of reinstatement, less his net earnings during said periods;

(e) Reimburse each of its employees for all the dues and assessments, if any, which it has deducted from his or her wages on behalf of The Independent Organization of Employees of Virginia Electric and Power Company;

[fols. 125-309] (f) Post immediately in conspicuous places throughout the respondent's system and maintain for a period of at least sixty (60) consecutive days notices to its employees stating: (1) that the respondent will not engage in the conduct from which it has been ordered to cease and desist in paragraphs 1 (a), (b), (c), and (d); (2) that it will take the affirmative action set forth in paragraphs 2 (a), (b), (c), (d), and (e) of this Order; and (3) that the respondent's employees are free to become or remain members of Transport Workers Union of America, Amalgamated Association of Street, Electrical Railway,

and Motor Coach Employees of America, or International Brotherhood of Electrical Workers, and that the respondent will not discriminate against any employee because of membership or activity in such organizations;

(g) Notify the Regional Director for the Fifth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith;

And It Is Further Ordered that the allegations of the complaint with respect to Joseph Bolton, T. N. Harrell, Jr., and J. L. Judge be, and they hereby are, dismissed.

Signed at Washington, D. C., this 24th day of September 1942.

Harry A. Millis, Chairman, Wm. M. Leiserson, Member, Gerard D. Reilly, Member, National Labor Relations Board. (Seal.)

[fol. 310] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5013

VIRGINIA ELECTRIC AND POWER COMPANY, Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 5020

THE INDEPENDENT ORGANIZATION OF EMPLOYEES OF THE VIRGINIA ELECTRIC AND POWER COMPANY, Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, Respondent

On Petition to Set Aside an Order of the National Labor Relations Board

OPINION—Filed December 9, 1942

(Argued November 23, 1942. Decided December 9, 1942)

[fol. 311] Before Parker, Soper and Dobie, Circuit Judges

George D. Gibson and T. Justin Moore (Hunton, Williams, Anderson, Gay & Moore on brief) for Petitioner in No. 5013; Wm. Earle White (Paul E. Hadlick on brief) for

Petitioner in No. 5020; and Robert B. Watts, General Counsel, National Labor Relations Board, (Ernest A. Gross, Associate General Counsel; Howard Lichtenstein, Assistant General Counsel; Ruth Weyand and Owsley Vose, Attorneys, National Labor Relations Board, on brief) for Respondent.

PARKER, Circuit Judge:

These are petitions by the Virginia Electric and Power Company, hereafter called the company, and the Independent Organization of Employees of the Virginia Electric and Power Company. hereafter called the I. O. E., to set aside an order of the National Labor Relations Board ordering the disestablishment of the I. O. E. as a company dominated organization, reinstatement with back pay of two discharged employees and reimbursement of employees for deductions from wages of amounts paid the I. O. E. under a check-off agreement. The Board asks that the order be enforced. The case was before us two years ago, when we entered an order setting aside the order of the Board theretofore entered. *Virginia Electric & Power Co.* v. *N. L. R. B.*, 4 Cir. 115 F. 2d 414. The Supreme Court granted certiorari and reversed our decision with direction that the case be remanded to the Board for redetermination of the issues in the light of that Court's opinion. *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 62 S. Ct. 344. This was done, and the case was heard by the Board on the record made at the prior hearing, without the introduction of additional testimony.

[fol. 312] The portion of the order directing disestablishment of the I. O. E. is assailed on the ground that it is not supported by substantial evidence. This, however, was the ground of our former decision setting aside the Board's order; and the reversal of that decision by the Supreme Court precludes another holding that the identical evidence is insufficient. The case is precisely similar to that in which an appellate court reverses a non suit or judgment upon a verdict directed for defendant on the ground of the insufficiency of the evidence. In such case the lower court upon remand is not limited in the reception of evidence, nor is it precluded from rendering any judgment that may be appropriate upon the new trial granted; but, as to the effect of the evidence passed upon by the appellate court, the

decision of that court is final and the lower court may not again grant a non suit or direct a verdict upon the same or substantially similar evidence. To that extent the decision of the appellate court becomes the law of the case. 3 *Am. Jur.* 553; 5 *C. J. S.* 1508; *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451, 456; *Dodd* v. *Union Indemnity Co.*, 4 Cir. 32 F. 2d 512; *Priester* v. *Southern R. Co.*, 4 Cir. 6 F. 2d 878; *Carpenter* v. *Durell*, 6 Cir. 90 F. 2d 57; *Claiborne-Reno Co.* v. *E. I. duPont de Nemours & Co.*, 8 Cir. 77 F. 2d 565; *Gulf, Mobile & Northern R. Co.* v. *Hardy*, 151 Miss. 113, 117 So. 536, 61 A. L. R. 1073; *Warehouse* v. *Everett*, 141 Wash. 339, 252 Pac. 157, 58 A. L. R. 1482; *Mahany* v. *Kansas City Railways Co.*, — Mo. —, 254 S. W. 16, 29 A. L. R. 817; *White* v. *Int. Text Book Co.*, — Iowa —, 136 N. W. 121, 42 L. R. A. (N. S.) 346. There is nothing in *Ford Motor Co.* v. *N. L. R. B.*, 305 U. S. 364, upon which the company relies, to indicate that the same rule is not to be applied to decisions on appeal to the Supreme Court from judgments of the Circuit Courts of Appeals dealing with orders of the Labor Board. That case involved no consideration of the sufficiency of the evidence by the Supreme Court, but merely the power of the Circuit Court of Appeals to remand a case to the Board for the purpose of setting aside its findings and order and making its decision and order upon reconsideration. That is a very [fol. 213] different matter from directing, as was done here, that the case be remanded for the Board to clarify its findings so as to show whether in reaching its conclusion it had or had not acted upon an erroneous theory of law.

In our former opinion we discussed at length the very matters upon which petitioners now rely and reached the conclusion that the order of disestablishment was not supported by substantial evidence. It was our decision, and not that of the Board, which was reviewed by the Supreme Court; and proper respect for that court requires the assumption that it would not have reversed a decision based on the insufficiency of the evidence unless it had deemed that decision erroneous. Certainly the court would not have remanded the case for clarification of the findings, if the evidence before it, as we held, was insufficient to sustain any finding of domination. The case is not one involving insufficient findings where there is a remand in order that sufficient findings may be made. There was a clear finding

of company domination accompanied by a comprehensive finding of evidentiary facts; but, because of expressions used by the Board, the Supreme Court was not certain that the finding of domination was not based upon certain of these evidentiary facts alone, i. e. the bulletin of April 26 and the speeches of May 24, without their being considered in connection with the other evidence. It was not suggested by anyone that the case be remanded for the taking of further evidence; and it is inconceivable that the court would have reversed our decision and directed further action by the Board unless it had been of opinion that the evidence was such that the Board could properly take action upon it and had intended so to decide.

While the court did not say in so many words that there was substantial testimony in the record which would justify Board action, it was made very clear that the Board would have been sustained if its order had been based on the totality of the evidence and there had been no question as to its being based solely on the bulletin and the speeches. In this connection the court said:

[fol. 314] "The command of sec. 10(e) of the Act that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive,' precludes an independent consideration of the facts. Bearing this in mind, we must ever guard against allowing our views to be substituted for those of the agency which Congress has created to administer the Act. But here the Board's conclusion that the Independent was a company-dominated union seems based heavily upon findings which are not free from ambiguity and doubt. We believe that the Board, and not this Court, should undertake the task of clarification."

After pointing out that the Board had found the bulletin and speeches had interfered with, restrained and coerced the employees, and that the company contended that this finding was repugnant to the First Amendment, the Court held that the Act did not enjoin the employer from expressing his views on labor policies or problems, but that conduct evidenced in part by speech might amount to coercion in connection with other circumstances. It then went on to say:

"If the Board's order here may fairly be said to be based on the totality of the company's activities during the period

in question, we may not consider the findings of the Board as to the coercive effect of the bulletin and the speeches in isolation from the findings as respects the other conduct of the company. If the Board's ultimate conclusion is based upon a complex of activities, such as the anti-union background of the company, the activities of Bishop, Edwards' warning to the employees that they would be discharged for 'messing with the C. I. O.', the discharge of Mann, the quick formation of the Independent, and the part which the management may have played in that formation, that conclusion would not be vitiated by the fact that the Board considered what the company said in conjunction with what it did."

And, as showing that the case was remanded merely for a determination by the Board as to whether or not domination was shown by the evidence without reference to the bulletin and speeches, or whether or not it was shown by the whole course of conduct evidenced in part by these utterances, and that these questions were held to be questions [fol. 315] for the Board upon the evidence, the following portion of the opinion is pertinent:

"It is clear that the Board specifically found that those utterances were unfair labor practices, and it does not appear that the Board raised them to the stature of coercion by reliance on the surrounding circumstances. If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone. The bulletin and the speeches set forth the right of the employees to do as they please without fear of retaliation by the company. Perhaps the purport of these utterances may be altered by imponderable subtleties at work which it is not our function to appraise. *Whether there are sufficient findings and evidence of interference, restraint, coercion, and domination without reference to the bulletin and the speeches, or whether the whole course of conduct evidenced in part by the utterances was aimed at achieving objectives forbidden by the Act, are questions for the Board to decide upon the evidence.*

"Here we are not sufficiently certain from the findings that the Board based its conclusion with regard to the Independent upon the whole course of conduct revealed by this record. Rather it appears that the Board rested heavily upon

findings with regard to the bulletin and the speeches the adequacy of which we regard as doubtful. We therefore remand the cause to the Circuit Court of Appeals with directions to remand it to the Board for a redetermination of the issues in the light of this opinion." (Italics supplied.)

The Board has reappraised the evidence in the light of the Supreme Court's opinion and has found interference, restraint, coercion and domination on the whole evidence and in consideration of the whole "complex of activities" shown by the evidence. This was done, not by the same Board, but by a Board with a completely changed membership. It was done, not pro forma, but in a careful appraisal of the circumstances relied on. In the first decision of the Board, the conclusions regarding the I. O. E. were contained in two of the printed pages of the record before us. In the last decision, these conclusions cover more than [fol. 316] fourteen pages, in which the Board's evaluation of the circumstances is fully set forth. With respect to the April 26 bulletin, the Board states its conclusions as follows:

"As regards the April 26 bulletin, we are not unmindful of the respondent's argument that its reference to the employees' right to join the union of their choice and its statement that no employee would suffer because of his member ship, assured the employees of its impartiality, and that hence the employees could not have been restrained in their choice of representatives by any statement contained in the bulletin. We do not agree, however, that the respondent's brief reference to the employees' rights under the Act rendered the employees wholly free with respect to joining unions. On the contrary, in view of the respondent's past hostility to labor organizations, and in view of the timing of the bulletin, after nationally affiliated organizations had attempted to organize the employees and at a time when the Supreme Court decisions sustaining the validity of the Act rendered further attempts imminent, we believe that the employees could not fail to be discouraged from joining 'national' labor organizations by the respondent's action in posting the bulletin, which, as a whole, so clearly showed the respondent's opposition to their taking such a step. The respondent's subsequent activities, including its successful

effort to effect the formation of a company-wide organization and the discharge of Mann because of his opposition to such an organization, cast revealing light on the respondent's motives in posting the bulletin. Viewing the bulletin in the light of the background in which it was posted and the respondent's subsequent activities, we find the bulletin clearly coercive. We accordingly find that the posting of the bulletin was an integral part of the respondent's conduct, and as such, interfered with, restrained, and coerced the respondent's employees in the exercise of the rights guaranteed in sec. 7 of the Act."

That the speeches were appraised in the light of the other evidence, and not held coercive without reference thereto appears from the following passages of the conclusions:

"We cannot agree that the message left the employees the complete and unfettered freedom of choice of representatives contemplated by the Act. Evaluating the message as [fol. 317] a whole in the light of the respondent's long-standing opposition to the organization of the employees, the anti-union activities of Superintendent Bishop, the bulletin of April 26 appealing to the employees to ignore the overtures of the organizers of nationally affiliated organizations, the discharge of Mann for advocating affiliation with a 'national' union, and the respondent's subsequent support of the proponents of the I. O. E. and interference with the activities of the adherents of nationally affiliated organizations, and giving due regard to the sensitivity of employees to even subtle expressions of preference on the part of their employers, we find that the respondent, in urging upon the employee representatives the formation of a bargaining agency of their 'own,' impaired the employees' free choice of representatives, notwithstanding the respondent's reference in the message to the employees' rights under the Act.

"Upon all the facts, we are convinced and find that the May 24 meetings were arranged and the respondent's message to the employees was prepared for the purpose of bringing about the formation of a company-wide unaffiliated organization. The messages themselves contain, as we have found above, a thinly disguised plea for the formation of just such an organization. Had not the respondent been determined to effect the formation of such an organization there would have been no lawful occasion for the respon-

dent's arranging the May 24 meetings as it did, for it had only recently 'advised' the employees concerning their rights under the Act. The whole procedure of the May 24 meetings was obviously chosen with a view to facilitating the formation of the desired organization. Not satisfied with the bulletin board method of transmitting messages to the employees, which the respondent had utilized in the past, this time the respondent delivered its message personally to representatives of the employees chosen at the respondent's behest. This strategy enabled the respondent to obtain a spokesman for its project in almost every department. The device of withdrawing from the meeting places and suggesting that the employee representatives remain for further discussion, we believe was intended to give them an opportunity to formulate their plans before consulting with their constituents and thus to expedite the formation of an organization. We conclude, therefore, that the respondent arranged the meetings and urged upon the employees the formation of a company-wide unaffiliated or-
[fol. 318] ganization because it feared the course the employees might pursue if the respondent did not intervene, that the respondent did so in a further effort to control the exercise by its employees of their right to self-organization, and that in doing so the respondent injected itself into a sphere of activity reserved exclusively to its employees and thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in sec. 7 of the Act."

After summarizing the evidence and evaluating its several features at greater length than we would be justified in quoting here, the Board states its conclusion with respect to the I. O. E. as follows:

"Upon all the facts summarized above, we conclude that the I. O. E. was not the result of the employees' free choice; that it was initiated in response to the urgings of the respondent at the May 24 meetings to set up their 'own' organization; that the respondent's support of the organization during the critical formative period and its consistent opposition to nationally affiliated organizations are largely responsible for the adherence of the employees to the organization; and that the contract with the I. O. E. granting a closed shop and the check-off of the I. O. E. dues marked

the climax of the respondent's efforts to erect an unaffiliated organization as a bulwark against nationally affiliated organizations. We find that the respondent has dominated and interfered with the formation and administration of the I. O. E. and has contributed support to it, and has in this and the other respect set forth above interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in section 7 of the act."

And apart from the doctrine of the "law of the case", we feel that in the light of the clear intimation of the Supreme Court as to the sufficiency of the evidence to sustain a finding of domination we would not be justified in holding it insufficient. In referring in the language above quoted to "the anti-union background of the company, Edwards' warning to the employees that they would be discharged for 'messing with the C. I. O.', the discharge of Mann, the quick formation of the Independent, and the part which the management may have played in that formation", the court [fol. 319] ascribed probative value on the issue of domination to these circumstances which we do not feel that we should ignore. The last decision of the Board considers these in connection with the bulletin and speeches and points to other probative features of the testimony not fully appraised in its former decision. We are admonished in the Supreme Court's decision that "we must ever guard against allowing our views to be substituted for those of the agency which Congress has created to administer the Act"; and other recent decisions of the court have emphasized that findings of the Board are binding, not merely with respect to evidentiary facts, but also with respect to conclusions of fact which may reasonably be drawn from them. Cf. *Gray* v. *Powell*, 314 U. S. 402, 62 S. Ct. 326.

Having reached this conclusion, we feel that we should express it as an additional ground of decision, to the end that there may be a final decision of the case by the Supreme Court, if certiorari is granted, whatever that court's view may be as to the applicability of the doctrine of the "law of the case". The fact that the conclusion is at variance with that reached by us on the former appeal does not militate against it. We did not then have the benefit of the analysis of the evidence contained in the Board's last decision, nor did we have the light of the Supreme Court's opinion. Our duty is to decide the question now presented

in the light of the present situation and not that which existed at the time of the former appeal; and if, in consideration of the subsequent decisions of the Supreme Court and the fuller discussion of the evidence by the Board, it appears that we were mistaken in applying to the record before us standards which the Supreme Court prescribes, that mistake can furnish no precedent for present action. We unhesitatingly admit and correct error, whether of law or fact, when pointed out by counsel on petition for rehearing. We should not hesitate to do so, when the error is pointed out by opinions of the Supreme Court.

Little need be said as to the discharges. As to the discharge of Mann, if the evidence of background has probative value on the issue of company domination, it is unquestion-[fol. 320] ably sufficient to sustain the Board's finding as to his discriminatory discharge. See our recent decision in *Hickory Chair Mfg. Co.* v. *N. L. R. B.*, 4 Cir. — F. 2d —(decided Nov. 12, 1942). The finding that the I. O. E. was company dominated brings within the category of unfair labor practices the discharge of Staunton because he would not become a member thereof in accordance with the closed shop agreement.

With respect to that portion of the order which directs reimbursement of employees for amounts paid to the I. O. E. under the check-off provision of the contract, we have a situation where, under contract with a company dominated union, the company made deductions from wages and paid them to the union. It is true that each employee, in his application for membership in the I. O. E., authorized that this be done; but as the contract contained a closed shop provision, he had no option but to submit to the deduction if he desired to retain his employment. Under such circumstances, the check-off was unquestionably an unfair labor practice; and the Board has found that reimbursement of employees for the wages thus deducted is necessary to expunge it. With respect to this matter, the Board said:

"We are of the opinion that, under the circumstances of this case, the respondent should be ordered to reimburse each employee for any amounts which the respondent has deducted from his wages for dues and assessments in the I. O. E. The respondent concluded a closed-shop contract with the I. O. E., a company-dominated organization, thus compelling its employees to become and remain members

of the illegal organization. Employees were in fact discharged because they refused to join the I. O. E. The check-off provision, a device by which the respondent assured the financial stability of the company-dominated organization, could no more be avoided by the employees than could the compulsory membership requirement. The by-laws of the I. O. E. required its members to execute check-off authorizations under penalty of being dropped from membership in the I. O. E., and thereby, under the closed-shop provision, from their jobs. We find that the monies thus deducted from the wages of the employees constituted the price of [fol. 321] retaining their jobs, a price coerced from them for respondent's purpose of supporting and maintaining the organization which respondent had dominated in order to thwart bona fide representation. We further find that, as a result of the imposition of the illegal closed-shop and check-off requirements, the employees suffered a definite loss and deprivation of wages equal to the amounts deducted from their wages and paid over to the I. O. E. It is appropriate that the employees be made whole by reimbursement of amounts exacted from them for illegal purposes. We find that in these circumstances, the effects of the unfair labor practices may be fully remedied and the purposes and policies of the Act may be completely effectuated only by restoring the status quo. Hence, we shall order the respondent to reimburse its employees for the amounts deducted from their wages for dues and assessments in the I. O. E."

Under section 10(c) of the *National Labor Relations Act*, 49 Stat. 454, 29 U. S. C. A. 160 (c), the Board has the power, upon a finding of unfair labor practice, not only to require the person guilty thereof to cease and desist therefrom, but also to require him "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act". It is clear, we think, that such affirmative action is not limited to "reinstatement of employees with or without back pay". As said by Judge Arant in the dissenting portion of his opinion in *N. L. R. B.* v. *West Kentucky Coal Co.*, 6 Cir. 116 F. 2d 816, 821, "the specification did not add to the Board's power, but illustrated the kind of affirmative order the Board could make". An order requiring reimbursement of the check-off under such circumstances as exist here clearly falls within

the power and is closely analogous to orders directing the payment of back wages in case of discriminatory discharge. In the case of discriminatory discharge, the employee has lost wages as the result of an unfair labor practice, and the payment of back wages is ordered to wipe out so far as possible the effect of the practice and effectuate the purposes of the act. Here, the employees have just as certainly lost the wages deducted under the check-off agreement, which because of the payment to a company dominated union is [fol. 322] also an unfair labor practice. It is for the Board, and not for us, to say what affirmative action is necessary to expunge the effect of such practice and effectuate the purposes of the act. *Phelps-Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 194; *N. L. R. B.* v. *Link Belt Co.*, 311 U. S. 584, 600; *International Ass'n of Machinists* v. *N. L. R. B.*, 311 U. S. 73, 82; *N. L. R. B.* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 250; *N. L. R. B.* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271.

It is true, of course, that the Board may not, under the guise of effectuating the purposes of the act, impose penalties or adjudicate tort claims. Cf. *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7. An order directing reimbursement of wages deducted pursuant to an unfair labor practice, however, does not fall within either of these categories. As said by Judge Hutcheson in *Agwilines, Inc.* v. *N. L. R. B.*, 5 Cir. 87 F. 2d 146, 151:

"The statute authorizes reparation orders not in the interest of the employee, but in the interest of the public. A cease and desist order operating retrospectively is not a private award, operating by way of penalty or of damages. It is a public reparation order, operating retrospectively by way of an order to cease and desist as to unfair practices, from their beginning; practices as to which, because forbidden in the interest of industrial amity, and therefore peace, Congress has the right to eradicate them as from the beginning."

We are advertent to the decisions refusing to enforce orders of the Board directing reimbursement of wages deducted under the check-off.[*1] We are not impressed, how-

[*1] *Western Union Telegraph Co.* v. *N. L. R. B.*, 2 Cir. 113 F. 2d 992; *Corning Glass Works* v. *N. L. R. B.*, 2 Cir. 118 F. 2d 625; *N. L. R. B.* v. *West Kentucky Coal Co.*, 6 Cir. 116 F.

[fol. 323] ever, with the reasoning of those which proceed upon the theory that the action of the Board amounts to the imposition of a penalty or the adjudication of a tort claim beyond its powers or that its action must be set aside because contravening equitable principles. We note that in only three of the cases[*2] was there a check-off under an agreement involving a closed shop, that two of these were from one circuit, and that the first of these two called forth a dissenting opinion more convincing to us than the opinion of the court.[*3] And in the case of *Kansas City Power & Light Co.*, Judge Stone, speaking for the Circuit Court of Appeals of the 8th Circuit, points out that while the case there involved did not justify an order of reimbursement, situations might arise which would justify such order, and distinguished from the case before him such a case as we have here, where the company initiated, formed and promoted the organization and assured its support by agreeing to the check-off. Judge Stone said in that case:

"There may be situations which would justify such an order. This is not one. The proposition for a check-off as a method of collecting dues originated with the Association, was opposed by the company and conceded only upon demand of the Association. Such dues were fixed solely by the Association and used solely in its activities. This is not an instance where the company initiated, formed and promoted an organization and assured its support through a check-off. It is an instance of the effect of a prior organization (the Plan) carrying over an influence which might

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2d 816; *N. L. R. B.* v. *United States Truck Co.*, 6 Cir. 124 F. 2d 887; *N. L. R. B.* v. *J. Greenebaum Tanning Co.*, 7 Cir. 110 F. 2d 984; *A. E. Staley Mfg. Co.* v. *N. L. R. B.*, 7 Cir. 117 F. 2d 868; *Reliance Mfg. Co.* v. *N. L. R. B.*, 7 Cir. 125 F. 2d 311; *Kansas City Power & Light Co.* v. *N. L. R. B.*, 8 Cir. 111 F. 2d 340; *N. L. R. B.* v. *Southwestern Greyhound Lines, Inc.*, 8 Cir. 126 F. 2d 883; *N. L. R. B.* v. *Continental Oil Co.*, 10 Cir. 121 F. 2d 120.

[*2] *N. L. R. B.* v. *West Kentucky Coal Co., supra; N. L. R. B.* v. *United States Truck Co., supra; N. L. R. B.* v. *J. Greenebaum Tanning Co., supra.*

[*3] Opinion of Judge Arant in the *West Kentucky Coal Co., case, supra.*

affect the entire freedom of employees to choose their bargaining agent."

It is argued that there is no occasion for reimbursement since the dues were paid to the I. O. E. on the order of the employees; but this circumstance loses significance when it is remembered that the I. O. E. is found to have been in-[fol. 324] itiated and promoted by the company for the purpose of defeating that collective bargaining which the Act contemplates, and that the employees were obliged to pay dues to it as a means of retaining their employment. It is argued, also, that the employees got the benefit of the check-off as the result of the payment to the union of which they were members. The answer, of course, is that the Act proceeds upon the theory that the maintenance of a company dominated union is not a benefit but a detriment to the employees who are members of it. And it is no answer to this to point to wage increases and other benefits secured as a result of contracts made by the company dominated union; for it is manifestly impossible to say that greater benefits might not have been secured if the freedom of choice of a bargaining agent had not been interfered with. It must be remembered, however, as above indicated, that it is not the redress of wrongs of employees which is the purpose of the order complained of, but the expunging ab initio of the effects of an unfair labor practice. The mere disestablishment of the company dominated union does not accomplish this result. It is accomplished only when action is taken which will place the parties, so far as possible, where they would have been if the unfair labor practice had not occurred. One means of doing this is to reimburse the employees for anything they may have been deprived of as a result of it. Cf. *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7, 12. The whole matter was well summed up by Judge Arant in the dissenting portion of his opinion in *N. L. R. B.* v. *West Kentucky Coal Co., supra*, 116 F. 2d 816, 820-821, as follows:

"The order to reimburse for wrongful checkoffs, though not specifically mentioned in the Act, is analogous to the order to make employees whole by the payment of back wages and promotes the policies of the Act in the same manner. The writer thinks reinstatement with back pay would have been authorized by sec. 10(c) even if it had not been specified; the specification did not add to the Board's power,

but illustrated the kind of an affirmative order the Board could make. A proceeding before the Board is not an action at law, and the Board's order does not redress wrongs to [fol. 325] individual employees. Though the order sometimes provides for deductions from back pay to the extent of earnings between dismissal and reinstatement, no case has been noted in which the employer was allowed to deduct an amount the employee *might* have earned had he used reasonable diligence to find another job. The wrongful checkoff of dues is neither more nor less tortious than wrongful dismissal; in neither case is there an inquiry as to extent of injury, as the Second Circuit rightly insists there should be in tort actions. The truth is that reinstatement of the employee and payment for time lost are remedies not known to the common law but created by statute. They 'are requirements imposed for violation of the statute and are remedies appropriate to its enforcement.' Mr. Chief Justice Hughes, in National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 48, 57 S. Ct. 615, 629, 81 L. Ed. 893, 108 A. L. R. 1352. 'The procedure the statute outlines is not designed to award, the orders it authorizes do not award, damages as such. The proceeding is not, it cannot be made, a private one to enforce a private right. It is a public procedure, looking only to public ends.' Hutcheson, J., Agwilines, Inc. v. N. L. R. B., 5 Cir., 87 F. 2d 146, 150."

For the reasons stated, the petitions to set aside the Board's order will be denied and the order will be enforced.

Order Enforced.

DISSENTING OPINION

SOPER, Circuit Judge, Dissenting in Part:

I concur in the result reached by the court in its opinion except insofar as it approves that part of the order of the Board which requires the Power Company to reimburse its employees for all of the dues deducted from their wages for the benefit of the independent organization. The argument in favor of the order is that since the checkoff was associated with the closed shop, the monies deducted from the wages of the men constituted payments made by them under the fear of losing their jobs; and that repayment is [fol. 326] necessary to offset the coercive measures of the

company and to effectuate the purposes of the Act. Similar arguments have been rejected by five Circuit Courts of Appeals in every case in which the exercise of the power has been attempted.

The facts in the present case in this regard are that the closed shop and checkoff were forced upon the company against its will by the independent organization; that no employee now seeks the return of his money; and that the company received no financial or other benefit from the payments, since they were turned over to the independent organization and used by it in successful efforts to secure substantial advantages for the employees in wages and working conditions. Under these circumstances there is no justice in ordering the return of the money for which the men have received their money's worth. Nor is there merit in the contention that the money should be returned because it was paid under compulsion. There is an element of duress in every closed shop wherein workmen are compelled to recognize the union and to pay the required dues, but these conditions are considered lawful because they are imposed upon the employees by their own action. There is no greater compulsion in the case of a company dominated union, when the closed shop and checkoff fees result from the voluntary action of the men and are accepted by the company against its desire in order to preserve industrial peace. It may be added that there is no greater reason to require a return of the wages checked off in this case than to recompense employees in every case for dues paid directly to a company union.

The effect of this provision of the Board's order is not to effectuate the policies of the Act, for that is done completely by the disestablishment of the independent organization whereby the freedom of the employees to choose their own representatives is made secure. The effect is merely to obtain the deterrent influence that is expected to flow from the imposition of a penalty. But the Supreme Court has held that the Board has no power to inflict punishment for its deterrent effect. In *Republic Steel Corp.* v. *Labor Board*, 311 U. S. 7, 11, 12, the court, speaking of the [fol. 327] power of the Board to take such affirmative action as will effectuate the policies of the Act, said:

"This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually un-

limited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive. Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 235, 236. See, also, National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U. S. 261, 267, 268. We adhere to that construction.

"In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end."

[fol. 328] In United States Circuit Court of Appeals, Fourth Circuit

No. 5013

Virginia Electric and Power Company, Petitioner,

vs.

National Labor Relations Board, Respondent

On Petition for Review of an Order of the National Labor Relations Board

Decree—Filed and Entered December 9, 1942

This Cause came on to be heard upon the petition of the Virginia Electric and Power Company to review and set aside a certain order issued against it by the National Labor Relations Board on the 24th day of September, 1942, in proceedings before said Board numbered C-914, C-915 and C-916, entitled "In the Matter of Virginia Electric and Power Company and Transport Workers Union of America", "In the Matter of Virginia Electric and Power Com-

pany and Amalgamated Association of Street, Electrical Railway and Motor Coach Employees of America, an unincorporated association", and "In the Matter of Virginia Electric and Power Company and International Brotherhood of Electrical Workers"; upon the answer of said Board and request for enforcement, and upon the transcript of record in said proceedings certified and filed in this Court; and the said cause was argued by counsel.

On Consideration Whereof, it is ordered, adjudged, and decreed by the United States Circuit Court of Appeals for the Fourth Circuit, that said order of the National Labor Relations Board in said proceedings, be, and the same is hereby, enforced, and that the said Virginia Elec-
[fols. 329-342] tric and Power Company abide by and perform the directions of the Board in said order contained.

John J. Parker, Senior Circuit Judge. —— ——, U. S. Circuit Judge. Armistead M. Dobie, U. S. Circuit Judge.

I dissent in part, as shown by the opinion filed herein.
Morris A. Soper, United States Circuit Judge.

[File endorsement omitted.]

[fol. 343] In Supreme Court of the United States, October Term, 1942

[Title omitted]

Stipulation as to Record

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that for the purposes of the petition for a writ of certiorari, the printed record may consist of, and that if a writ of certiorari be granted, the record upon which this case shall be heard shall consist of, the following:

1. The printed Transcript of Record heretofore filed in this case in this Court *sub nom.* National Labor Relations Board, Petitioner, vs. Virginia Electric and Power Company and National Labor Relations Board, Petitioner, vs. The Independent Organization of Employees of Virginia Electric and Power Company, Nos. 25 and 26, October Term 1941.

2. The following additional papers, namely:

(a) The opinion of this Court in this case dated December 22, 1941;

(b) The order of the National Labor Relations Board in this case dated April 3, 1942;

(c) The decision and order of the National Labor Relations Board in this case dated September 24, 1942;

[fol. 344] (d) The opinion of the United States Circuit Court of Appeals for the Fourth Circuit in this case dated December 9, 1942; and

(e) The order of the United States Circuit Court of Appeals for the Fourth Circuit in this case dated December 9, 1942.

Subject to this Court's approval, it is further stipulated and agreed that there need be no reprinting of the Transcript of Record referred to in 1 above but that said petition, and the case if said writ be granted, may be submitted on such copies of the original printing as may remain available.

Subject to this Court's approval, it is further stipulated and agreed that petitioner will cause the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit to file with the Clerk of the Supreme Court the entire record certified and filed by said Board in said Circuit Court of Appeals or otherwise on file in this case in the Clerk's office of said Circuit Court of Appeals.

It is further stipulated and agreed that, if it should become necessary, additional portions of the certified record may be designated to be printed by either of the parties hereto, and, upon being printed, such additional portions shall be deemed part of the record herein.

Charles Fahy, Solicitor General of the United States.

Dated at Washington, D. C., this 28 day of December, 1942.

Hunton, Williams, Anderson, Gay & Moore, Attorneys for Virginia Electric and Power Company.

Dated at Richmond, Virginia, this 23d day of December, 1942.

[fol. 345] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 709

ORDER ALLOWING CERTIORARI—Filed March 15, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 709

IN THE

Supreme Court of the United States

October Term, 1942

VIRGINIA ELECTRIC AND POWER COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD.

Petition for Writ of Certiorari
To the United States Circuit Court of Appeals
For the Fourth Circuit

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Dated February 3, 1943

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Petition for Writ of Certiorari To the United States Circuit Court of Appeals For the Fourth Circuit

Virginia Electric and Power Company (hereinafter called the Company), prays that a writ of certiorari issue to review, to the extent stated below, the decree (S. R. 78)[1]

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[1] Pursuant to a stipulation of the parties (S. R. 79) the record for purposes of this petition (and for disposition on the merits if the writ be granted) consists of two volumes. The first is the printed Transcript of Record heretofore filed in this case in this Court *sub. nom. National Labor Relations Board, Petitioner* v. *Virginia Electric and Power Company* and *National Labor Relations Board, Petitioner* v. *The Independent Organization of Employees of Virginia Electric and Power Company*, October Term, 1941, Nos. 25 and 26. That is referred to herein as (R. .....). Only 7 copies of such printed Transcript of Record remain available, aside from those preserved in the permanent records of the Court. Such 7 copies are filed herewith. The stipulation further agrees, subject to this Court's approval, that there need be no reprinting of such Transcript of Record but that this petition (and the case if the writ be granted) may be submitted on such copies of the original printing as may remain available.

The second volume of the record consists (likewise pursuant to said stipulation) of the principal proceedings subsequent to such Transcript of Record, namely:

(a) The opinion of this Court in this case dated December 22, 1941 (S. R. 1);

(b) The order of the Board dated April 3, 1942,, vacating its order previously reviewed and prescribing further procedure (S. R. 11);

(c) The decision and order of the Board dated September 24, 1942 now sought to be reviewed (S. R. 13);

(d) The opinion of the United States Circuit Court of Appeals for the Fourth Circuit dated December 9, 1942 determining to enforce the order referred to in (c) (S. R. 62);

(e) The order of the United States Circuit Court of Appeals for the Fourth Circuit dated December 9, 1942 effectuating the opinion referred to in (d) (S. R. 78); and

(f) Said stipulation of the parties as to the record.

That volume is referred to herein as (S. R. .....).

There has been filed with the Clerk the entire original record certified and filed by the Board in the office of the clerk of the court below or otherwise on file in that office.

of the United States Circuit Court of Appeals for the Fourth Circuit entered on December 9, 1942, enforcing in its entirety an order (S. R. 59) of the National Labor Relations Board (hereinafter called the Board) against the Company. The question sought to be reviewed is one left undetermined by the Court when the case was reviewed on *certiorari* before.[2]

Opinions Below

The opinion of the Circuit Court of Appeals (S. R. 62) is not yet reported [except in 6 Labor Cases (C. C. H.) ¶ 61.357]. The decision and order of the Board (S. R. 13) is reported in 44 N. L. R. B. No. 75.[3]

Jurisdiction

The decree of the Circuit Court of Appeals was entered on December 9, 1942 (S. R. 78). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 and under Section 10 (e) and (f) of the National Labor Relations Act (hereinafter called the Act).

Questions Presented

1. Pursuant to individual assignments of employees (R. 843) and the provisions of an agreement of August 5, 1937 (R. 828) with a labor organization of employees known as The Independent Organization of Employees of Virginia Electric and Power Company (hereinafter called I. O. E.), the Company has semi-annually since that date deducted from wages amounts equal to dues in, and paid

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[2] S. R. 10; *National Labor Relations Board* v. *Virginia Electric & Power Company*, 1941, 314 U. S. 469, 480.

[3] This is a pamphlet copy of the decision and order issued in advance of the bound volume. It is available in the library of the Court.

such amounts to, the I. O. E. Such agreement also provided, at the instance of the employees and against the wishes of the Company, for a closed shop. The Board has sustained a complaint against the Company of "dominating and interfering with the formation and administration" of the I. O. E. and "contributing support to it" (S. R. 59); but there is no evidence, nor is there any claim, of any such conduct after the payment of the first installment of dues; and there is no evidence, nor is there any claim, that the I. O. E. has been other than independent since that time. The record shows many advantages obtained by the I. O. E. for its members, notably wage increases, overtime and arbitration. All dues paid to the I. O. E. have been used by it for its own purposes (maintenance of offices and meeting places, employment of counsel, etc.). Their aggregate now largely exceeds $45,000 (R. 843 and 442-3).

In such circumstances, may the Board, in ordering disestablishment of the I. O. E., require the Company to reimburse employees for all dues so checked off?

2. To the extent, if any, that may be pertinent to a review of 1. above, was there adequate evidence and basis in law to support the Board's finding of "dominating and interfering with the formation and administration" of the I.O. E. and "contributing support to it"?[4]

---

[4] This question is presented only so far as may be pertinent to a reversal of the decree below to the extent that it enforces the dues reimbursement clause of the Board's order (paragraph (e) of section 2) (S. R. 61). It is not presented to procure a reversal of the decree below to the extent that it enforces the disestablishment requirement of the Board's order (paragraph (b) of Section 1 and paragraph (a) of Section 2) (S. R. 60). On December 14, 1942 the I. O. E. notified the Company that the I. O. E. had decided to dissolve without asking for a review of the decree below (certified supplemental record, vol. II, p. 53). On the same day the Board entered on order in its Case No. R-4571 (*In the Matter of Virginia Electric & Power Company and Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, A. F. of L.*, 45 N. L. R. B. No. 183[3]) finding that the street car and bus operators (a part of the employees

Statute Involved

The pertinent provisions of the Act are set out in the Appendix.

Statement

On February 27, 1940 the Board entered a decision and order finding that the Company had violated Section 8(1, 2 and 3) of the Act and ordering disestablishment of the I. O .E., reimbursement of checked-off dues and certain other conduct (R. 952-980). On the petition of the Company the court below held that the Board's finding of domination was unsupported by evidence and that the other findings were also unsupported (R. 1006-19) and accordingly, on November 12, 1940, set aside the order in its entirety (R. 1019-20; 115 F. 2d 414).

The Board asked for certiorari on three questions, two of them being whether the Board's order of disestablishment was supported by evidence and whether the dues reimbursement requirement was within its power.[5] The validity of the dues reimbursement requirement, it was urged by the Solicitor General and General Counsel for the Board,[6] presented "a question of importance in the administration of the National Labor Relations Act." The writ was granted on March 31, 1941.

---

of the Company and similarly a part of the members of the I. O. E.) constituted a separate bargaining unit, and directing that an election be held in such unit to determine its collective bargaining representative. On December 18, 1942 the Company posted a bulletin complying with the disestablishment requirement (certified supplemental record, vol. II, pp. 54, 58-62).

[5] Petition of the Board in *National Labor Relations Board* v. *Virginia Electric and Power Company*, October Term 1940, No. 758, pp. 3-4. The third question, not presently relevant, was whether a cease and desist order was supported by evidence (id., p. 4).

[6] Petition referred to in n. 4 above, at pp. 26 and 28-29.

On December 22, 1941 this Court delivered an opinion (S. R. 1, reported in 314 U. S. 469) reversing the decree below and remanding the cause to the Board "for a redetermination of the issues in the light of this opinion". This was apparently on the ground that the findings of the Board were defective, being based largely on the legally untenable premise that the words of a bulletin of April 26, 1937 and a speech of May 24, 1937 were in themselves coercive, so that in effect there was no action by the administrative agency, such action being, of course, a prerequisite to judicial review. The Court carefully added:

> "We do not mean to intimate any views of our own as to whether the Independent [I.O.E.] was dominated or suggest to the Board what its conclusion should be when it reconsiders the case. Since the Board rested the remainder of its order in large part on its findings with respect to domination of the Independent [I.O.E.], we do not at this time reach the other parts of the Board's order, including the command that the checked-off dues and assessments [sic] should be refunded" (S. R. 10, 314 U. S. at 480).

Upon remand, the Board, on the original record without further evidence, enlarged somewhat upon its original decision, by elaborating the form of its presentation and adding some insubstantial further incidents, but relying mainly, as before, on the tenor of those two communications. Upon such findings, the Board entered an order (S. R. 59), of like form with its predecessor of 1940.

Contrary to the rule that in such cases review begins again *de novo*,[7] the court below, when the matter was pre-

[7] *Ford Motor Co.* v. *N. L. R. B.*, 1939, 305 U. S. 364, 373-4, 376; *Securities and Exchange Commission* v. *Chenery Corporation*, S. Ct. Oct. Term 1942 No. 254, dec. Feb. 1, 1943, Supreme Court Service (C. C. H.), op. vol. pp. 537, 542, 546; 11 U. S. Law Week 4160, 4161, 4163; not yet otherwise reported.

sented to it again by petition of the Company, felt that the reversal of its original decree by this Court "precludes another holding that the identical evidence is insufficient" (S. R. 63), for the ruling of this Court had made it the law of the case that a disestablishment order could be entered by the Board on the original record. Even apart from that doctrine, the court below felt that there was a "clear intimation" in this Court's opinion that the evidence was sufficient for that purpose (S. R. 70). On those two grounds alone, without any consideration of the evidence,[8] the court below felt constrained to order enforcement of the disestablishment and re-employment provisions of the Board's order. In doing so, a majority of the court concluded that the dues reimbursement requirement was within the power of the Board (S. R. 71-76), Soper, C. J., dissenting (S. R. 76).

Thereafter the I. O. E. elected to dissolve and the Company published a bulletin complying, or stating a willingness to comply, with all provisions of the Board's order except the dues reimbursement requirement (see note 4 above).

Reasons for Granting the Writ

1. The question of the validity of the dues reimbursement requirement is of importance in the administration of the Act. In this belief counsel charged with responsibility for administration of the Act have concurred (see page 4 above). The question is one that has not been, but should be, settled by this Court.

2. The decision below sustaining the dues reimbursement requirement is the only decision sustaining such an order of the Board. In all other cases where the issue of the validity of such a requirement has been presented, the requirement has been held invalid as beyond the power of the

[8] Though with a polite bow to the reasonableness, as well as the authority, of this Court's opinion (S. R. 71).

Board. Ten decisions in five Circuits have so held.[9] The decision below is thus in conflict with the decisions in other Circuit Courts of Appeals on the same matter.

3. The decision below is probably in conflict with principles declared in decisions of this Court on different, though related, questions: *Consolidated Edison Co.* v. *N. L. R. B.*, 1938, 305 U. S. 197, 235-6; *Republic Steel Corporation* v. *N. L. R. B.*, 1940, 311 U. S. 7, 11-12; and *Phelps Dodge Company* v. *N. L. R. B.*, 1941, 313 U. S. 177, 198.

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[9] The cases are:

Second Circuit

Western Union Telegraph Co. v. *N. L. R. B.*, 1940, 113 F. (2d) 992
and
Corning Glass Works v. *N. L. R. B.*, 1941, 118 F. (2d) 625

Sixth Circuit

N. L. R. B. v. *West Kentucky Coal Co.*, 1940, 116 F (2d) 816; and
N. L. R. B v. *United States Truck Co.*, 1942, 124 F. (2d) 887

Seventh Circuit

N. L. R. B. v. *J. Greenebaum Tanning Co.*, 1940, 110 F. (2d) 984;
A. E. Staley Manufacturing Co. v. *N. L. R. B.*, 1940, 117 F. (2d) 868; and
Reliance Manufacturing Co. v. *N. L. R. B.*, 1942, 125 F. (2d) 311

Eighth Circuit

Kansas City Power & Light Co. v. *N. L. R. B.*, 1940, 111 F. (2d) 340; and
N. L. R. B. v. *Southwestern Greyhound Lines, Inc.*, 1942, 126 F. (2d) 883

Tenth Circuit

N. L. R. B. v. *Continental Oil Company*, 1941, 121 F. (2d) 120.

A closed shop clause, included expressly in the agreement or existing in fact by known policies of the employer, was involved in the first of the above cases in the Second Circuit (see 113 F. (2d) at 994), both of the above cases in the Sixth Circuit (see 116 F. (2d) at 820 and *In the Matter of United States Truck Co., Inc.*, 1939, 11 N. L. R. B. 706, 713), the first of the above cases from the Seventh Circuit (see 110 F. (2d) at 986) and the first of the above cases in the Eighth Circuit (see 111 F. (2d) at 343). So the closed shop requirement was before the court in every Circuit which has passed on the question except the Tenth. The different classification of these cases by the court below (S. R. 74) is erroneous.

holding that the Act does not give the Board "a punitive jurisdiction."

Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be granted.

In order to avoid the expenditure of effort, materials and money that would be required to reprint the original Transcript of Record of over one thousand pages, it is respectfully moved that the order granting the writ, if entered, shall provide that the case may be submitted, so far as relates to the original Transcript of Record, on the printed copies thereof filed herewith, without any additional printing.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY

By T. JUSTIN MOORE
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HUNTON, WILLIAMS, ANDERSON,
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Of Counsel

Dated February 3, 1943.

Appendix

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. A., Sec. 151, *et seq.*):

* * * * *

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: PROVIDED, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: PROVIDED, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a

condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

Prevention of Unfair Labor Practices

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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No. 709

IN THE

Supreme Court of the United States

October Term, 1942

VIRGINIA ELECTRIC AND POWER COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari
To the United States Circuit Court of Appeals
For the Fourth Circuit

PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM

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Dated March 6, 1943.

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PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM

The Question

The Memorandum for the Board, filed in answer to the Petition dated February 3, 1943 for a writ of certiorari, joins "in requesting that a writ of certiorari issue to review that portion of the decision below which enforced the provision of the Board's order respecting reimbursement for dues checked off" (Memorandum, p. 6).*

The Board, however, asks that "the writ, if granted, be limited to" that question (*id.*, p. 7), so as to exclude the other question presented in the Petition, namely:

> "To the extent, if any, that may be pertinent to a review of [the above question], was there adequate evidence and basis in law to support the Board's finding of 'dominating and interfering with the formation and administration' of the I.O.E. and 'contributing support to it'?" (Petition, p. 3).

This reply is filed in opposition to that suggested limitation of the writ.

Argument

The quoted question is not uncertain. If it be the view of the Court that in no circumstances does the Board have power to order reimbursement of dues, there is no need to consider the facts. If, however, it be the view of the Court that the question whether the Board has such power depends on the facts of the particular case, then the quoted question asks this Court to consider all the facts in the record and

*While these words seem, and should be, absolute, other portions of the Memorandum indicate that they intend a review of that question only on the premise that all findings of the Board are supported by evidence.

in doing so to disregard, as unsupported by the evidence, all the adverse findings of the Board which would otherwise screen those facts from judicial scrutiny.* The scope of this question is in no way limited by the fact that the *relief* sought upon such disregard of Board findings is only a reversal of the decree below so far as it enforced the dues reimbursement order. Nor is the issue obscured by the fact that *further* relief which might be granted upon such disregard of Board findings (namely, a reversal of the decree below so far as it enforced the disestablishment order), is not requested, the validity of that requirement having become moot by the dissolution of the I.O.E.

Both questions being identified in the Petition, and the public concern being indicated, it was not necessary for the Petition to review the merits, still less to point out the respects in which the Board's findings are not supported by substantial evidence.

Surely the Board, taking, as it does, the view that the validity of the dues reimbursement order "depends upon the particular circumstances of this case" (Memorandum, p. 7), can not ask this Court to review the order on the Board's findings alone without regard to the evidence. Whatever may be the public importance of a ruling on the Board's power, that should be given in "a concrete situation with all its qualifying incidents," for "to know 'the justice of the particular case' . . ., one must know the case in its particulars" (*Lowden* v. *Northwestern National Bank & Trust Co.*, 1936, 298 U. S. 160, 165). This Court approaches generalizations only through an equitable determination of the rights of parties litigant at the bar.

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*Had there been any uncertainty in the original request, it is surely eliminated by this request for a universal consideration of the whole record and a universal disregard of all findings of the Board adverse to the Company or the I.O.E.

A writ of certiorari should be granted and should be without limitation so as to permit such an equitable disposition of the cause.

Respectfully submitted,

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Dated March 6, 1943.

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No. 709

IN THE

Supreme Court of the United States

October Term, 1942

VIRGINIA ELECTRIC AND POWER COMPANY
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

On Writ of Certiorari to
The United States Circuit Court of Appeals
For the Fourth Circuit

BRIEF FOR VIRGINIA ELECTRIC AND POWER COMPANY

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Transcript of Record, [R. .....], heretofore filed in this court *sub. nom. National Labor Relations Board, Petitioner,* v. *Virginia Electric and Power Company* and *National Labor Relations Board, Petitioner,* v. *The Independent Organization of Employees of Virginia Electric and Power Company,* October Term 1941, Nos. 25 and 26 ..... 2, 3, 8, 10, 25, 26, 27, 28

Supplemental Volume, [S. R. .....], filed *sub. nom. Virginia Electric and Power Company, Petitioner* v. *National Labor Relations Board* 1, 3, 4, 5, 6, 7, 8, 9, 10, 14, 16, 17, 18, 20, 29, 37

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BRIEF FOR VIRGINIA ELECTRIC AND POWER COMPANY

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (S. R. 62)[1] is reported in 132 Fed. 2d 390. The decision and order of the National Labor Relations Board (hereinafter called the Board) is reported in 44 N.L.R.B. 404.

JURISDICTION

The jurisdiction of this Court rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C.A., Section 347(a)) and upon Section 10(e) and (f) of the National Labor Relations Act (hereinafter called the Act).

The decree under review of the Circuit Court of Appeals, entered on December 9, 1942 (S. R. 78), enforced an order of the Board against Virginia Electric and Power Company (hereinafter called the Company) in a proceeding instituted by the Company to set aside the Board's order, the Board's answer having requested enforcement. Certiorari was granted on March 15, 1943.

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[1]References to the Record are as follows:

"R. ....." refers to pages of the printed Transcript of Record heretofore filed in this case in this Court *sub. nom. National Labor Relations Board, Petitioner, v. Virginia Electric and Power Company* and *National Labor Relations Board, Petitioner, v. The Independent Organization of Employees of Virginia Electric and Power Company*, October Term 1941, Nos. 25 and 26.

"S. R. ....." refers to the supplemental volume filed *sub. nom. Virginia Electric and Power Company, Petitioner, v. National Labor Relations Board.*

"Supplemental Record, Vol. II, p. ....." refers to unprinted pages of the supplemental record certified on this appeal.

STATUTE INVOLVED

Pertinent provisions of the Act are set out in Appendix A hereto.

QUESTIONS PRESENTED

The petition for certiorari was limited to the following questions:

1. In the circumstances of this case, may the Board, in ordering disestablishment of an unaffiliated union (The Independent Organization of Employees of the Virginia Electric & Power Company, herein called I.O.E.) require the Company to reimburse employees for all dues deducted from wages and paid to the I.O.E. pursuant to individual assignments by employees and the provisions of a union agreement with the I.O.E.?

2. To the extent, if any, that may be pertinent to the review of 1. above, was there adequate evidence and basis in law to support the Board's finding of "dominating and interfering with the formation and administration" of the I.O.E. and "contributing support to it"?

STATEMENT OF THE CASE

1. How the Case Comes Up

On a complaint dated May 7, 1938 (R. 9) alleging violations of Section 8 (1-3) of the Act by the Company, the Board held hearings in May and June, 1938 (R. 27). A decision and order sustaining, in greater part, the allegations of the complaint were issued on February 27, 1940 (R. 953), ordering, among other things, that the Company disestablish the I.O.E. as collective bargaining agent of its

employees (R. 979) and reimburse employees for all dues deducted from their wages and paid to the I.O.E. (R. 980).

The Circuit Court of Appeals for the Fourth Circuit held on November 12, 1940 (R. 1006, reported in 115 F. 2d 414) that "there is nothing to show that the employees' association does not represent the free choice of the employees, that the company at any time dominated or in any way interfered with the employees in setting it up or that the company exercises over it any control or domination whatsoever" (R. 1008), in other words that the Board's findings were not supported by evidence and were unsupported in law. That court accordingly entered a decree setting aside the Board's order in its entirety (R. 1019).

On certiorari, this Court delivered an opinion on December 22, 1941 (S.R. 1, reported in 314 U. S. 469), the intent of which was a matter of debate before the Board and before the court below. In the view of the Company, the opinion held that the Board had proceeded on a misconception of law in believing that the words of a bulletin of April 26, 1937 and a speech of May 24, 1937 (both of which are commented on below) were in themselves a violation of the Act, and that the Board's other conclusions seemed essentially dependent on its findings with respect to that bulletin and speech, so that there was, in effect, no administrative determination, which was of course prerequisite to any judicial review. In the view later taken by the court below, the opinion held, or at least implied, that the evidence was sufficient to sustain findings of domination if made properly. In any event the cause was remanded to the court below with directions to remand to the Board for a redetermination of the issues in the light of the opinion.

On the same record, without any additional evidence, the Board promulgated a new decision and order dated September 24, 1942 (S. R. 13, reported in 44 N.L.R.B. 404), of

similar effect, for present purposes, with its 1940 decision and order.

The court below felt, contrary to the rule that in such cases review begins again *de novo*,[2] that the reversal of its former decree by this Court "precludes another holding that the identical evidence is insufficient" (S. R. 63) for the ruling of this Court had made it the law of the case that a disestablishment order could be entered by the Board on the original record, and that, apart from that doctrine, there was a "clear intimation" in this Court's opinion that the evidence was sufficient for that purpose (S. R. 70). On those two grounds alone, without any consideration of the merits,[3] the court below felt constrained to order enforcement of the Board's order. In doing so, a majority of the Court concluded that the dues reimbursement requirement was within the power of the Board (S. R. 71-76), Soper, C. J., dissenting (S. R. 76).

2. Outline of the Facts

The Board's 1940 decision rested on 8 episodes, all of which are relied on again in its 1942 decision, either unchanged or with some refinements of presentation. The facts may be most briefly outlined by enumeration of those episodes. For convenience, references are added to each of the two decisions of the Board:

(1) *Background.*—After a strike in 1922, no labor organization existed. In 1933 the Company's president spoke about the National Industrial Recovery Act, saying that the employees could form or join labor organizations but that

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[2] *Ford Motor Co.* v. *N. L. R. B.*, 1939, 305 U. S. 364, 373-4, 376; *Securities and Exchange Commission* v. *Chenery Corporation*, 1943, 317 U. S. ....., 87 L. ed. 411.

[3] Though with a polite bow to the reasonableness, as well as the authority, of this Court's opinion (S. R. 71).

he believed it unnecessary.[4] The Company continued the employment of Walters to gather news on all matters including labor matters, but no report on the latter was made after the enactment of the Act nor was his existence known to the men.[5] [In fact, Walters became fatally ill before any of the events here in question (*i.e.* in March, 1937), never got out of bed again, was discharged near the end of May and died soon afterwards.[6]]

(2) *Bishop.*—In 1936 Bishop, the Superintendent of the Company's Norfolk transportation department, questioned some employees about organizational matters in connection with prolonged parties at a bootleg store.[7]

(3) *Edwards.*—A minor supervisor, Edwards, observed employees entering a union meeting and expressed opposition to national unions.[8]

(4) *Bulletin.*—On April 26, 1937 the Company posted throughout its properties a bulletin (S. R. 24-25) proclaiming freedom of organizational choice, stating that it was not necessary to join any organization and that if any employees wished to discuss anything with any officials, the latter would be glad to meet them.[9] The Board construed this as an appeal not to organize.

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[4]Unchanged; for 1940 Decision see R. 959; for 1942 Decision see S. R. 45 and 61.

[5]Refined; for 1940 Decision see R. 960; and see Board's 1940 Brief, pp. 20-21; for the Board's 1942 Decision see S. R. 22-23, 35-36 and 41-42. One employee heard of the employment, but after its termination (cf. R. 29 and R. 76).

[6]R. 56-59, 326-327, 331-334, 371-372, 399-402, 444-462.

[7]Unchanged; 1940 Decision, R. 959-961; 1942 Decision S. R. 23-24, and 37.

[8]Refined, with one new incident of similar character added; 1940 Decision, R. 960; 1942 Decision, S. R. 33-34 and 40.

[9]Refined; 1940 Decision, R. 961-2; 1942 Decision, S. R. 24-25, 37 and 42-43.

(5) *Speech.*—On May 24, 1937 Company officials read an address (S. R. 27-28) to sample audiences informing the men that requests had been received from scattered fractional groups of employees, stating that it was not practical to negotiate with such groups, quoting Section 7 of the Act on the organizational liberty of the men and announcing that the Company was willing "to bargain with its employees in any manner satisfactory to the majority of its employees and that no employee will be discriminated against because of any labor affiliations he desires to make."[10] The Board construed this as an appeal to organize an unaffiliated union. It is the main basis of the Board's action.

(6) *I.O.E. calendar.*—The sample audiences on May 24 reported the address to their fellows and before June 1 large majorities in each group had voted for the creation of an unaffiliated independent union. A lawyer was retained, he prepared organization papers and an organization was formally instituted on June 15, 1937. In a membership campaign during the next two weeks 90% of the employees joined. Officers were elected on July 2-12 and bargaining demands were formulated at a convention on July 17-19. These demands were immediately served on the Company. Negotiations were begun on July 30th and continued aggressively for three days (July 30-August 1). Thereafter an agreement was signed under which the I.O.E. became the exclusive bargaining agent for all non-supervisory employees of the Company. This discussion is unchanged[11] except that:

> (a) the discussion of the use of Company property that was made to some extent by I.O.E. organizers before June 15 is refined;[12]

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[10]Unchanged except that part of the Board's decision is refined: 1940 Decision, R. 962-4; 1942 Decision, S. R. 27-28, 37-39 and 44-46.

[11]1940 Decision, R. 965-7; 1942 Decision, S. R. 29-33.

[12]1940 Decision, R. 965-6, 1942 Decision, S. R. 29, 40 and 46-47.

(b) the discussion of the employee list supplied on the request of the I.O.E. organizers by the Company at cost[13] is refined (S.R. 30 and 40); and

(c) the discussion of the I.O.E. contract, principally the alleged speed of the Company's assent, but including also the provisions for closed shop and check-off, is refined.[14]

(7) *First payment of dues.*—Two weeks after executing the I.O.E. contract the Company paid the I.O.E. the amount of the required check-off, then overdue under the contract, before completing the mechanical task of entering that wage deduction in all employee accounts.[15]

(8) *Discharges.*—The Board's 1940 Decision found that four employees (Mann, Elliott, Harrell and Staunton) had been discriminatorily discharged; the 1942 Decision holds that one of these (Harrell) was not discriminatorily discharged and that reinstatement should not be required for another (Elliott). Otherwise the discussion of the discharges is unchanged except that the discharge of Mann (an accident-prone trolley operator who was discharged for impertinence) is given greater emphasis and is used to color the whole issue of domination and interference.[16]

While, as above indicated, some of the above material has been rewoven, the yarn is the same, the colors are the same and the resulting pattern is indistinguishable in substance from that presented in the Board's 1940 decision.[17]

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[13]Heretofore contained only in the briefs of Board counsel, e. g., 1941 Brief, p. 35.

[14]1940 Decision, R. 967; 1942 Decision, S. R. 32 and 41.

[15]Unchanged; 1940 Decision, R. 967; 1942 Decision, S. R. 33.

[16]1940 Decision, R. 969-75; 1942 Decision, S. R. 49-53, and 56-58.

[17]The length, however, was increased, as the court below pointed out, from 2 pages to 14 (of the record before it) for the statement of the conclusions as to the I.O.E. (S. R. 67).

In the present decision as in 1940 the dominating events on which the whole case turns are the two executive communications on organizational matters, the bulletin of April 26 and the speech of May 24. The other material is merely incidental to those communications, or is a collection of random conduct by subordinate supervisors which could not have had any general influence.

The only new material dealt with in the present decision, and not in the decision of 1940, relates to one minor supervisor in one of the three departments of the Company's business in one of the many communities served by it (Bishop, transportation department, Norfolk, Virginia). Bishop is now found, in conversation with one employee, to have expressed opposition to affiliated unions and suggested the organization of an unaffiliated union (S.R. 25-26), but the only effect was a petition for a wage increase (S.R. 26, and R. 65-66 and 96). Bishop is now also found to have tried to influence another employee, leading a separate movement in the Norfolk transportation department, to combine with the incipient I.O.E. (S.R. 34-35), but when some contemporary claim to that effect was made in the public press, it was at once denied by a bulletin posted throughout the properties over the president's signature, the bulletin concluding with this basic statement of policy:

> "Employees of Virginia Electric and Power Company have a right to self-organization, to form, join or assist labor organizations and to bargain collectively through representatives of their own choosing, and the Company has not sought and does not seek to dominate or interfere with employees in the exercise of any of their rights, individually or collectively." (R. 861).

As it later appeared, this bulletin (of June 24, 1937) was at the very height of the competitive drive for union membership.

The relative triviality of these two new incidents shows, quite as well as the industry of the Board in elaborating its conclusions with respect to the April 26 bulletin and the May 24 address, that those two communications remain the heart of the Board's case. The Board's additions and refinements are designed to disclose some new semblance of employer attitude that could not be derived from the words themselves. With respect to those words, it will be remembered, this Court said:

> "If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone. The bulletin and the speeches set forth the right of the employees to do as they please without fear of retaliation by the Company" (S. R. 9; 314 U. S. at 479).

While the case was pending on review in the court below, the National War Labor Board entered a directive order of November 3, 1942 restraining the Company from entering into "any contractual relationship" with the I.O.E. "until such time as the collective bargaining agent is chosen under the law,"[18] thus preventing consummation of a wage increase the negotiation of which had just been substantially concluded by the I.O.E.[19] On December 9, 1942 the opinion of the court below was entered (S.R. 62), enforcing the Board's order without review of the merits. On December 14, 1942 the Board entered an order at the instance of a complaining union in another proceeding[20] finding that the street car and bus operators (nearly half of the employees of the Company and a similar proportion of the members of the

[18]Certified Supplemental Record Vol. II, p. 13 (at pp. 13 and 96).

[19]Certified Supplemental Record Vol. II, p. 13 (at pp. 6-9).

[20]In the Matter of Virginia Electric & Power Company and Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, A. F. of L., 45 N.L.R.B. No. 183.

I.O.E.) constituted a separate bargaining unit and directing that an election be held in such unit to determine its collective bargaining representative. On the same day the I.O.E. notified the Company that it had decided to dissolve, without asking for a review of the decree below.[21]

On December 18, 1942 the Company posted a bulletin quoting the Board's order and the order of the court below, announcing compliance therewith (except the dues reimbursement requirement), disestablishing the I.O.E. and announcing that "all employees are free to become or remain members of Transport Workers Union of America, Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America, or International Brotherhood of Electrical Workers, and the Company will not discriminate against any employee because of membership or activity in such organizations."[22]

3. Summary

The main basis for the finding of domination is the bulletin of April 26, 1937 and the speech of May 24, 1937, other incidents being relied on chiefly as a setting for those communications. There is no evidence or finding, nor has there ever been any claim, of domination or interference except during the period of choice (R. 1012-13); specifically, there is no evidence or finding, nor has there ever been any claim, of any domination, interference or support after the execution of the I.O.E. contract on August 5, 1937, except performance by the Company of the closed shop and check-off clauses. So the I.O.E. was not a glove for the employer's hand but must be taken, from that time on, as the free agent

[21]Certified Supplemental Record Vol. II, p. 53.

[22]Supplemental Record, Vol. II, pp. 54, 58-62. This bulletin is quoted at greater length below.

of the men themselves, managed independently by them for the accomplishment of their own wishes as they viewed them.

Finally, no court has held that the I.O.E. was unlawfully created. The opinion of this Court, which was considered below to preclude repetition of its original holding that the evidence did not support a finding of domination, said:

> "We do not mean to intimate any views of our own as to whether the Independent [I.O.E.] was *dominated or* suggest to the Board what its conclusion should be when it reconsiders the case." (S. R. 32).

The I.O.E. succumbed, it seems fairly plain, not to the decree below but to its inability to consummate the contract it had negotiated and to the splitting of its electorate into two bargaining units, all of which made it seem that the I.O.E. could no longer best serve the interest of the men. The dissolution of the I.O.E. was, of course, the reason why review was not sought of the decree below so far as it enforced the disestablishment order.

SUMMARY OF ARGUMENT

1. *The Controlling Standards.*—The only relevant power of the Board is "to take such affirmative action . . . as will effectuate the policies of this Act", namely, to encourage collective bargaining and protect full freedom of self-organization (Section 10(c) and Section 1). Restoration of the *status quo* is a valid criterion of power only if, and to the extent that, it serves to "effectuate the policies of this Act". The Act is concerned only with a public wrong; private losses have no significance except in so far as their persistence may thwart the free exercise of the right of collective bargaining and self-organization and their redress may restore free exercise of that right. *National Licorice Company* v. *N.L. R.B.*, 1940, 309 U. S. 350 [Section 2 below].

2. *Public Wrong.*—Disestablishment of the I.O.E. and proclamation again of complete freedom of organizational choice has fully terminated any public wrong and fully restored complete freedom of exercise of the statutory rights [Section 3(a) below]. The public wrong, if any, of this employer is now ended and its repetition is forbidden by injunction; the only possible effect of dues reimbursement would be to deter other employers from agreeing to a checkoff in other cases because of the punishment imposed on this employer, but that is no sufficient basis for power on the part of the Board. *Consolidated Edison Company* v. *N.L.R.B.*, 1938, 305 U. S. 197, 236; *Republic Steel Corp.* v. *N.L.R.B.*, 1940, 311 U. S. 7, 11-13 [Section 3(b) below]. With respect to the employees, any public wrong in respect of them by this employer is now fully terminated and its repetition forbidden by injunction; so far as they, or any other employees, may be concerned with other employers, knowledge that reimbursement of dues will follow disestablishment of any dominated union can not contribute to independence when the choice of joining, or remaining a member, of any particular union is made, but would indeed tend to the opposite effect, being in this respect sharply distinguishable from knowledge of immunity from loss of job and pay. These circumstances being decisive as to the public wrong, it is immaterial what, if any, private injury may have been sustained [Section 3(c) below].

3. *Private Wrong.*—The checkoff has no causative relation to any private injury that may have been sustained [Section 4(a)(1) below]. Moreover, there is no basis for any finding that any private injury has been sustained. There is no basis for any finding that the checkoff was involuntary as to any individual, for both the checkoff and the closed shop were forced upon the Company by representatives of 90% of the employees as a price of industrial peace; the

Company made deductions from wages only in accordance with assignments executed by individual employees; there is no evidence that any employee signed his assignment unwillingly or sought in any way to terminate it; there is no evidence or finding or contention that the I.O.E., from the moment of its organization, was managed in any way other than by the men themselves in the independent realization of their own wishes; and the men were wholly free to eliminate the closed shop or the checkoff or reduce or eliminate the dues [Section 4(a)(2) below]. But even if any payment of dues was involuntary, nevertheless such payment was offset by the benefit received, for whatever public detriment the continuation of a dominated union may involve, it does not *ipso facto* impose any private injury on its members; but indeed notable advantages were obtained by the I.O.E. and it is wholly impossible to find that the employees would have benefited in any greater degree by any other possible state of affairs [Section 4(a)(3) below]. The closed shop clause, which is the real target of the Board's objection, does not in itself involve any determinable injury to any individual, for coercion by employer preference could be quite as effective in the absence of any formal proclamation [Section 4(b)(1) below]. As in the case of the checkoff, it is wholly indeterminable that any employee became or remained a member of the I.O.E. unwillingly; indeed the closed shop clause was forced on the Company by the employees; there is no evidence that any employee wished or sought to resign from the I.O.E.: the employees had the entire power of decision whether to continue, or to eliminate, the closed shop clause; and it is, in result, impossible to find that the employees would have gained by any other possible state of affairs [Section 4(b)(2)]. So neither membership nor payment of dues was involuntary or unprofitable; reimbursement of dues is merely a penalty because of a past violation of the

Act and in itself powerless to remedy the evil or even to contribute to that end [Section 4(c) below].

4. *Causation.*—The unchallenged freedom of the employees in the management of the I.O.E. according to their own wishes constitutes a supervening cause which excludes any causative responsibility of the employer for the collection or use of dues [Section 5 below].

5. *Finding as to Domination.*—Dues reimbursement is not supportable on the basis of the disestablishment order for that order rests at bottom only on the words of the bulletin of April 26 and the address of May 24; those communications do not offend the Act; and the other events provide no reasonable basis for any finding of management position contrary to the plain meaning of the words themselves [Section 6 below].

6. *Conclusion.*—The decree below should therefore be reversed to the extent that it enforces the dues reimbursement requirement (Section 2(e) of the Board's order, S. R. 61).

ARGUMENT

1. Introduction

Requirements of Board orders for reimbursement of dues collected by means of a checkoff have been considered, aside from the case at bar, in 11 cases by 5 Circuit Courts of Appeal. In all such cases the dues reimbursement requirement was set aside as being beyond the power of the Board. Out of 22 Judges who sat in these various cases, only one dissented.

A summary of the reasoning in such cases is provided in Appendix B hereto. Such reasoning is utilized in the following argument, but the argument is organized as an independent discussion of the applicable principles.

2. The Controlling Standards

The Board has the power to require any persons guilty of an unfair labor practice "to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act" (Section 10(c); 29 U.S.C.A. Sec. 160(c)). That is the only relevant grant of power to the Board, so the order in question must be justified under that grant if at all. The determining phrase, of course, is "to take such affirmative action . . . as will effectuate the policies of this Act".

The policies of the Act are declared in Section 1, 29 U. S. C. A. Sec. 151, as to protect commerce:

> ". . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

This simple purpose of the Act has been summarized in slightly differing terms by this Court:

> "The remedial purposes of the Act are quite clear. It is aimed, as the Act says (Section 1) at encouraging the practice and procedure of collective bargaining and at protecting the exercise by workers of full freedom of association, of self organization and of negotiating the terms and conditions of their employment or other mutual aid or protection through their freely chosen representatives." (*Republic Steel Corp.* v. *N.L.R.B.*, 1940, 311 U. S. 7, 10.)

> "We repeat that the fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial

> peace to remove obstructions to the free flow of commerce as defined in the Act." (*N.L.R.B.* v. *Fansteel Corp.*, 1939, 306 U. S. 240, 257.)

So a reimbursement order is within the power of the Board only if it will effectuate those policies. That is the decisive standard. Surely it should be kept close at hand so that at the crisis of decision the course may be guided by it rather than by any of the verbal formulae that have been found useful as practical aids to identifying it in some situations.

That caveat is particularly applicable to the formula of "restoring the *status quo*," which was relied on by a majority of the court below (S. R. 75). That formula was developed by the Board as a rule of thumb for remedying unfair labor practices. But the Act says nothing about the restoration of the *status quo;* it talks only of effectuation of the policies of the Act. Restoration of the *status quo* may or may not be a valid criterion, but if so, it is so only because it will, in the circumstances of a particular case, effectuate the policies of the Act, for that alone is the power conferred by the Congress.

In the application of this decisive standard of effectuating the policies of the Act, it also seems important to bear in mind that the standard, like the Act at large, is not concerned with private wrongs but only with the public wrong of interference with the free exercise of the right of organization.[23] Private losses have no significance except in so far as their persistence may thwart the free exercise of the right of collective bargaining and self-organization and their redress may restore free exercise of that right.

Of course, only the question of power is before this Court. Within the limits of its power, the Board has discretion to

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[23]74th Congress, 1st Session, House Report No. 972, May 21, 1935, p. 21, House Report No. 1147, June 10, 1935, p. 24; *National Licorice Co.* v. *N.L.R.B.*, 1940, 309 U. S. 350.

choose the appropriate remedy and no review of that discretion is sought here.

3. Public Wrong

(a) Introduction

The I.O.E. is now dead. Pursuant to the decree below (S. R. 78), the I.O.E. was dissolved by its membership and disestablished by the Company. A bulletin, published by the Company throughout its properties on December 18, 1942, quoted the order of the Board and the order of the Court below and then announced:

> "In compliance with said Orders the Company:
>
> "(1) States that it will not engage in the conduct from which it has been ordered to cease and desist in paragraphs (1) (a), (b), (c) and (d) in the first of said Orders.
>
> "(2) Withdraws all recognition from The Independent Organization of Employees of Virginia Electric and Power Company as the representative of any of its employees for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of employment; completely disestablishes The Independent Organization of Employees of Virginia Electric and Power Company as such representative; and states that it will not bargain collectively with The Independent Organization of Employees of Virginia Electric and Power Company in the future or have any other dealings with it as a representative of any employees of the Company.
>
> . . . . .
>
> "(4) States that all employees are free to become or remain members of Transport Workers Union of America, Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America,

> or International Brotherhood of Electrical Workers, and the Company will not discriminate against any employee because of membership or activity in such organizations."[24]

So complete freedom of bargaining opportunity is now restored and fully secured. That is the statutory objective and it is now realized in full. What possible addition to its completeness could be made through reimbursement of dues? Most of the Circuit Courts of Appeal which have considered such orders have taken the view that dues reimbursement could add nothing to the realization of the statutory policies, for these had been fully secured by similar disestablishments. It may be helpful, however, to examine the practical situation in somewhat closer detail.

(b) Effect on the Employer

A required action in such cases may have an effect upon "the payor and payee, one or both" (*Republic Steel Corp.* v. *N.L.R.B.*, 1940, 311 U. S. 7, 14, diss.)

So far as the employer is concerned, his wrong, if any there was, is now ended. A court injunction (S. R. 78) prevents any future repetition. That prevention cannot be further assured by any penalty. So far as other employers are concerned, punishment to this one as an example might conceivably deter them from agreeing to any check-off in other situations. But, if so, they would be deterred from making such an agreement with any union and not merely with unaffiliated unions, for it is not only unaffiliated unions that the Board may find to have been dominated (e. g., *Consolidated Edison Co.* v. *N.L.R.B.*, 1938, 305 U. S. 197), and forecasting the result of such proceedings may require "omniscience frequently not given to members of the legal

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[24]Supplemental Record Vol. II, pp. 54 and 58-62.

profession" (*Phelps Dodge Co.* v. *N.L.R.B.*, 1941, 313 U. S. 177, 207, diss.). It is not clear that this would in any way effectuate the policies of the Act. The check-off, like the closed shop, is an advantage which all unions seek and which is certainly lawful in respect of undominated unions. But even if the Court should consider that this would effectuate the policies of the Act, or consider that the Board's inferential judgment to that effect should be accepted, nevertheless that could be true only in the sense that punishment to one now may deter others in the future. There is nothing, however, in the Congressional history of the Act to indicate any power on the part of the Board to achieve the beneficent purposes of the Act and promote industrial peace by hanging heads on a tower wall. This Court has repeatedly held that deterrence by punishment is no basis for power on the part of the Board. Thus:

> "The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." (*Consolidated Edison Co.* v. *N.L.R.B.*, 1938, 305 U. S. 197, 236.)
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> ". . . it is not enough to justify the Board's requirement to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." (*Republic Steel Corp.* v. *N.L.R.B.*, 1940, 311 U. S. 5, 12.)
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> . . . "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act." (id. 11).

Dues reimbursement will therefore not effectuate the policies of the Act so far as this employer is concerned, or any other employer.

(c) Effect on the Employee

With respect to the employee, his liberty in respect of organizational choice is now restored. It is as complete as it can be. It can not be made any more complete by any money award. So far as the past is concerned, no order can undo the lapse of time or re-create in the past a liberty that was then denied, nor can any device, whether a money award or otherwise, have any tendency to that end. So far as the future is concerned, each of these employees has, with respect to this employer, the benefit of the injunction (S. R. 78), which is the strongest assurance Government can offer. These employees have, with respect to any other employers with whom they might work, and all other employees have, the knowledge that any dominated union will be struck down. Their independence at the time of choice or thereafter can not be increased by knowing that in such event there would be a refund of any dues that should have been paid to the dominated union; on the contrary, if such knowledge were capable of having any effect, it would tend to make them more *amenable* to membership in dominated unions rather than less so. In this respect, it is to be sharply contrasted with back pay, for the certainty of immunity from loss of job and pay on account of union preference is essential to independence.

This point was well put in an editorial comment in 41 Columbia Law Review (1941) pp. 748-9:

> "Aside from this possible ground for upholding the action of the Board, it would appear that an order which is solely designed to rectify a past wrong is not au-

thorized. The Supreme Court requires affirmative action to be 'remedial in nature.'[9] In its effort to conform to this test, the Board has adopted the view that the way to remedy unfair labor practices is, wherever possible, 'to restore the status quo.'[10] It would seem, however, that mere restoration of the status quo does not obviate the necessity of showing that an order also serves to encourage collective bargaining or to protect the employees' freedom of association. The main category of orders said to 'restore the status quo' are those which provide for the payment of back pay to employees reinstated after a discriminatory discharge; the Board has argued that the action taken in the principal case is closely analogous to such an order.[11] But the back pay order, in addition to being specifically authorized by the Act,[12] plainly furthers its declared objectives. By assuring the employee that reimbursement will be forthcoming should he suffer loss as a consequence of em-

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[9]An action is remedial when the power is 'exercised in aid of the Board's authority to restrain violations and to remove and avoid the consequences of violation where those consequences are of the kind to thwart the purposes of the act.' Consolidated Edison Co. v. N.L.R.B., 305 U. S. 197, 236 (1938); N.L.R.B. v. Fansteel Metallurgical Corp., 306 U. S. 240, 257 (1939).

[10]Heller Bros. Co. of Newcomerstown, 7 N.L.R.B. 646, 656 (1938) quoted in Third Ann. Rep., N.L.R.B. (1939) 199, n. 85; Colorado Milling & Elevator Co., 11 N.L.R.B. 66, 75 (1939); Foster Bros. Mfg. Co., Inc., 1 N.L.R.B., 880, 889 (1936). See also N.L.R.B. v. Remington Rand, Inc., 94 F. (2d) 862, 872 (C.C.A. 2d, 1938).

[11]N.L.R.B. v. Greenebaum Tanning Co., 110 F. (2d) 984, 989 (C.C.A. 7th, 1940).

[12]The Board is expressly empowered to take 'affirmative action, including reinstatement with or without back pay.' Section 10(c), 29 U.S.C. §160(c) (Supp. 1938). The circuit courts are split as to whether the Board may order back pay *without* reinstatement. Compare Phelps Dodge Corp. v. N.L.R.B., 113 F. (2d) 202 (C.C.A. 2d, 1940), *cert. granted*, 3 C.C.H. Labor Law Serv. Paragraph 51013 (1940) and Mooresville Cotton Mills v. N.L.R.B., 94 F. (2d) 61 (C.C.A. 4th, 1938) with N.L.R.B. v. Carlisle Lumber Co., 99 F. (2d) 533, 537 (C.C.A. 9th, 1938).

ployer hostility, it encourages independent union activity."[13]

"It is less apparent, on the other hand, how the order rejected in the instant case could be said to perform a comparable function. When an employee is urged to join an employer-dominated union, the possibility, even were it known to him, of later reimbursement for any dues paid would do nothing to foster independence."

It is clear, therefore, that a reimbursement order can not effectuate the policies of the Act so far as these employees are concerned, or any other employees.

Since reimbursement of dues can not subserve the public purposes envisaged by the Act, there is no occasion to inquire whether the check-off worked any injury to the employees individually. Any such injury, if it existed, would be immaterial from the point of view of the Act and incompetent to sustain the reimbursement order. As this Court has said:

"The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. *Amalgamated Utility Workers* v. *Consolidated Edison Co., ante,* p. 261; H. Rept. No. 1147, 74th Cong., 1st Sess., Committee on Labor, p. 24; cf. *Federal Trade Commission* v. *Klesner,* 280 U. S. 19. It has few of the indicia of a private litigation and makes no requirement for the presence in it of any private party other than the employer charged with an unfair labor practice. The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining

[13] (1940) 40 Columbia Law Rev. 1275. See also Note (1939) 48 Yale L. J. 1265. Under this view of the case, restoration of the status quo is merely the result of the order and not its rationale."

and by protecting the 'exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment . . .' §1. The immediate object of the proceeding is to prevent unfair labor practices which, as defined by §§7, 8, are practices tending to thwart the declared policy of the Act. To that end the Board is authorized to order the employer to desist from such practices, and by §10(c) it is given authority to take such affirmative remedial action as will effectuate the policies of the Act. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, supra.*

"In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." (*National Licorice Co.* v. *N.L.R.B.*, 1940, 309 U. S. 350, 362-63.)

(d) Conclusion

The Board may not escape the particularity of the above analysis by using this very nomenclature of a public wrong. A wrong, though public, must still be concrete; and any remedy must be actually remedial. The wrong here, if any was committed, was a deprivation during a past period of time of full freedom of organization on the part of the employees. No such wrong can be remedied in money unless there is either a legislative fixing of a penalty or some basis for determining the amount. Here the Congress has not fixed any penalty and there is no basis for measuring the wrong in terms of money, for money has no relationship to the wrong.

The Board being given power only to terminate a public wrong and remove its consequences where they are "of a kind to thwart the purposes of the Act", it follows that

there is no power to require dues reimbursement, both because there are no remaining consequences "of a kind to thwart the purposes of the Act" and because dues reimbursement would in itself have no tendency to effectuate the policies of the Act. It is unnecessary, therefore, to inquire into any question of private injury. But since a claim of private injury was presented forcibly by the Board in the Court below and reflected in the opinion, an examination of that claim may now be made. That will indeed offer an advantage by reflecting additional light on the question of public wrong itself.

4. Private Wrong

(a) The Checkoff

Though not so found in terms by the Board, the checkoff was urged by Board counsel in the court below as an unfair labor practice in itself, in that the I.O.E. was a dominated union. There is, of course, nothing in the Act that proscribes a checkoff as such or that attaches to it any special consequence. A checkoff is merely one of the countless possible ways in which aid may be given. The question is again whether a public wrong has been committed by interfering with the free exercise of the right to self-organization. To an independent union, the checkoff is lawful; but to a dominated union the checkoff is unlawful in that it gives help to the union. The extent of the actual help is not measurable in money, for it may range from the mere convenience of a collection service to strong moral support. But *non constat* that this involves any actual injury to any individual, for a number of reasons:

(1) Each individual would be under exactly the same constraint, and in fact a good deal more inconvenience, if there were no checkoff at all, so long as there is a closed

shop. The coercion is the threat, solemnized usually in an agreement between the employer and the union, of discharge for non-membership in the union. Since the union rules normally require the payment of some dues, that threat requires the payment of the stipulated dues. But it is no injury to any individual that the dues, payment of which is required, are required to be paid in any particular way, whether solely by individual remittances, or optionally by individual remittances or by company checkoff or solely by company checkoff. The reduction from individual receipts is the same in all three methods. The real target of the Board's complaint is therefore manifestly the closed shop clause; the checkoff has no causative relation to any possible injury.

(2) There is no evidence, nor is there any finding, that any individual signed any assignment of wages for the checkoff, or permitted any deduction for the checkoff, or made any direct payment of dues, unwillingly. On the contrary:

(i) Neither the checkoff nor the closed shop was an invention of the Company in this case or imposed by it on unwilling employees to lock the chains around them. Both the checkoff and the closed shop were invented by the I.O.E. and forced upon the Company as a price of industrial peace. The checkoff was agreed to by the Company in the first day of the negotiations (R. 260, 265 and 875-6). There was no strong Company objection, for deductions were already made for the convenience of the men on their written orders to pay third persons (R. 299-300). The form of the agreement was an undertaking by the Company to honor individual assignments, to which was added, at the Company's insistence, an express proviso that any such as-

signment might be revoked at any time[25] (R. 876). This would of course have made the operation of the checkoff entirely optional with each individual had it not been for the adoption on the following day of the closed shop. The closed shop clause had been the first substantive proposal of the I.O.E. negotiators, but it was met by violent opposition on the part of the Company. It was discussed most of the morning of the first day without any approach to an agreement. At that time it was tabled to see if the conferees could make progress on other provisions. It was not taken up again until the end of the second day, when it was finally agreed to as a part of the general settlement involving wages, which had been the other main point of disagreement.[26] At the Company's insistence the language proposed by the I.O.E. was modified so as expressly to permit any employee to be a member of any other labor organization.[27] The Company yielded grudgingly, however, and when negotiations for a renewal contract were

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[25]"The Employer agrees to accept a written order signed by any member of the Employee Organization authorizing the Employer to deduct from that member's wages the amount therein specified and to pay to the Employee Organization said amount less the Employer's cost of making such deduction. Any such order may be revoked at any time by notice in writing given by the employee to the Employer."

[26]R. 260, 264-5, 299-300, 324, 358-9, 460-61, 875-6 and 878.

[27]"During the term of this agreement, the Employer hereby agrees not to retain in its employment for a period of more than ninety days after the date of this agreement any employee eligible for membership in the Employee Organization, unless such employee is a member of the Employee Organization. The Employee Organization agrees to furnish to the Employer within five days after the signing of this agreement a complete list of all members of the Employee Organization and thereafter to keep said membership roll so furnished to the Employer currently up to date.

"Nothing contained in this agreement shall prevent or in any wise affect the right of any employee to join or remain a member of any other labor organization." (R. 827-8)

begun a year later, "one of the first demands the company made, was the abolition of the closed shop" (R. 461). The negotiators who successfully pressed this demand upon the Company represented 90% of the non-supervisory employees; that is, that proportion of the employees had signed membership cards in the I.O.E. (R. 843), thus assenting to the I.O.E. by-laws which provided for a mandatory checkoff (R. 855), before the negotiations began (R. 655-6).

(ii) The Company made deductions from wages only in accordance with assignments to that effect (R. 843) executed by every individual employee. 90% of the employees had signed these assignments before the negotiations for the I.O.E. contract began (R. 655-6). There is no evidence, nor is there any finding, that any of these were executed involuntarily. As this Court said in *Consolidated Edison Co.* v. *N.L.R.B.*, 1938, 305 U. S. 197, 238:

> "To say that of the 30,000 who did join there were not those who joined voluntarily or that the Brotherhood did not have members whom it could properly represent in making these contracts would be to indulge an extravagant and unwarranted assumption."

(iii) There is no evidence, nor is there any finding, nor has there ever been any claim that any employee ever revoked his assignment of wages or sought to do so or made demand in any way that the checkoff as to him be discontinued.

(iv) There is no evidence, nor is there any finding, nor has there ever been any claim, that the Company in any way interfered with the independent management

> of the I.O.E. after the moment of its organization. On the contrary, the evidence puts it beyond the reach of reasonable question that the I.O.E. was at all times managed by the men themselves for the active realization of their own wishes, so the men had the entire choice whether the checkoff was to be continued and if so, in what amount. The original I.O.E. contract of August 5, 1937, by which the checkoff and the closed shop were agreed on (but which nowhere specified the amount to be deducted, that being left to the assignments themselves) could be terminated by either party at the end of any annual period (R. 838); supplemental agreements were in fact executed on June 14, 1939, May 8, 1940 and May 23, 1941.[28] Any of these amendments might have eliminated the checkoff and the closed shop. The I.O.E. by-laws, by which the amount of dues was determined and the checkoff made mandatory, could be amended by a two-thirds vote of the General Committee at any two consecutive regular meetings (R. 855). An amendment at any time might have made the checkoff optional for each individual or reduced the amount of dues to any desired figure.

So there is no basis in the evidence for any inference that the checkoff did not express free assent on the part of the men. There is no basis in the Act for any rule of law that unwillingness on their part is to be conclusively presumed. The payments therefore were voluntary and could not involve any injury.

(3) Even if any payment of dues should, as to any of the employees, be deemed involuntary, nevertheless there would be an offset to the extent of the benefit received:

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[28]Certified Supplemental Record, Vol. II, p. 13 (id. pp. 6 and 14).

(i) As noted above, the employees had uninhibited management of the I.O.E., so they had, among other things, entire charge of all expenditures. It was entirely competent for them to discontinue their lease of quarters, discharge secretary and counsel and refrain from any other activities that would involve expense. If they chose to continue the rent of quarters, the maintenance of a secretarial organization and the retainer of counsel and, in a word, their active, purposeful undertaking, they received the full benefit of these expenditures. In the course of the negotiations conducted by the I.O.E., the employees obtained large wage increases, overtime, vacation with pay and collective machinery for the adjustment of grievances, including arbitration. If the Board's equivocal finding that by the closed shop and checkoff "the employees suffered a definite loss and deprivation of wages equal to the amounts deducted from their wages and paid over to the I.O.E." (S.R. 55) means a *net loss,* rather than a loss-and-deprivation-of-wages, there is no evidence to support it, there is irresistible evidence against it, and the Act does not authorize any conclusive presumption to that effect. While it may be true "that the Act proceeds upon the theory that the maintenance of a company dominated union is not a benefit but a detriment to the employees who are members of it," as the majority of the court below believed (S.R. 75), the main point of policy is missed by their language of private contract; for injury to the public by interference with free exercise of the right to self organization is quite compatible with a private benefit to the individual employees from wage increases. Congress has not said that a dominated union is an individual "detriment to the employees," still less has it said that such detriment

can outweigh advantages so obtained or, for that matter, have any measurable degree. As Judge Learned Hand said for the Circuit Court of Appeals for the Second Circuit, in *Western Union Telegraph Co.* v. *N.L.R.B.*, 1940, CCA 2, 113 F. 2d 992:

> "It by no means inevitably follows, because an employer has so conducted himself towards a union as to disqualify it from acting as a collective bargaining agent for all his employees, that he has inflicted pecuniary damage upon each member of that union." (997)
>
> . . . . .
>
> "Even though it be true that each employee was denied a right secured by the statute to him personally; i. e. the right to bargain collectively through an untrammelled agent; the measure of his damages for that wrong is not the fees which he paid to the Association." (997-8)

(ii) It is wholly indeterminable, and not even the Board has sought to determine, whether any arrangement other than the I.O.E. would have been made by the employees at the time in question or whether any such other arrangement, even if made, would have yielded any greater benefits. It is, in other words, impossible to show that the employees would have benefitted in any degree by having no union or by having any union other than the I.O.E. *A fortiori* it is impossible to show that they would have benefitted by any alternative in the amount of the checked off dues.

(iii) Clearly, therefore, there is no ascertainable injury to any individual and even if there were, it would be due to the action of the employees themselves (a point noted more fully below) and not of the employer. But even if there were an injury and even if it were in

any degree due to any action of the employer, still it would be due not to the checkoff, which is the gravamen of the complaint here, but to the closed shop clause which compels membership. So to that we may now turn.

(b) The Closed Shop

The closed shop clause is expressly sanctioned by the Act in the case of an independent union (Section 8(3)), but the Act does not proscribe the closed shop clause for a dominated union specifically, or attach to it any special consequences. The closed shop clause, like the checkoff, is merely one of the countless possible ways in which help may be given. The extent of the help is a function of the attitude of the employees, varying inversely with the energy of their allegiance. The public wrong itself, *i.e.*, interference with free exercise of the right to self-organization, is not occasioned solely by the closed shop clause nor is it to be measured by it and the Congress has not indeed contemplated that it would be measured in money at all. Here also, as in the case of the checkoff, it is indeterminable that any actual injury to any individual is involved, for

(1) Communication of an employer's wishes does not have to be made by the formal terms of a written agreement in order to be effective. Understanding of the employer's wishes can be equally potent no matter how subtle may be the divination of those wishes. Thus, *In the Matter of West Kentucky Coal Co. and United Mine Workers of America, Dist. 23*, 1938, 10 N.L.R.B. 88, the contract with a dominated union did not provide a closed shop but:

> "Practically all employees of the respondent are members of the E. M. B. A. because it has been

> understood clearly by all of them that such membership is a prerequisite to permanent employment with the respondent."[29] (96)

Covert preferences by the employer may thus be quite as effective as a proclamation of a closed shop and there is no way of drawing the line between degrees of preference or degrees of manifestation. There is accordingly, for the present point, no difference between this case and the minimum conceivable case of a dominated union. Reimbursement can be justified here only if the Board may require reimbursement in any case of a dominated union, even in the absence of a closed shop clause and even where dues are paid directly to a union without the intervention of a checkoff.

(2) It is indeterminable that any employee became or remained a member of the I.O.E. unwillingly. On the contrary:

> (i) As noted above, the closed shop clause was forced upon the Company over its strong objection by intransigeant representatives speaking for 90% of the non-supervisory employees, all of whom desired a closed shop clause and assented to it in writing before the Company agreed (see 4(a)(2)(i) above).
>
> (ii) There is no evidence that any employee sought to resign, or wished to resign, from the I.O.E.

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[29]The written contract provided a checkoff. The Board, in ordering disestablishment, required dues reimbursement, and the latter requirement was set aside in *N.L.R.B.* v. *West Kentucky Coal Co.*, 1940, CCA 6, 116 F. 2d 816.

(iii) The employees had the entire power of decision whether to continue the closed shop clause. The Company's opposition was notorious and the employees, speaking through the channels of the I.O.E., could eliminate that clause, legally at the expiration of any annual period after the original agreement, or practically, it is obvious, at any moment, even though during any annual period.

So there is no evidence or finding, and it is impossible to determine, how many men, if any, would have resigned from the I.O.E. except for the closed shop, *i.e.*, how many, if any, were actually coerced by it.

(3) There is no evidence or finding, and it is impossible to determine, whether the employees would have gained or lost by any other possible state of affairs, whether by the absence of any union or the substitution of some other union for the I.O.E.

(c) Conclusion

The difficulties encountered in seeking to identify and measure any private injury sustained by the maintenance of a dominated union are a natural consequence of attempting to require private awards under legislation concerned only with the freedom of organization and collective bargaining. Quite aside from the question of the location of responsibility for any injury (discussed below), it is impossible to show that membership or payment of dues was involuntary or unprofitable, and no basis exists on which any finding of injury can be made compatibly with traditional standards of fairness, which are relevant in the interpretation of the Act (*Phelps-Dodge Corp.* v. *N.L.R.B.*, 1941, 313 U. S. 177, 198). In one situation alone the Con-

gress has provided for a money award, namely, back pay in the case of a discriminatory discharge, because the assurance of immunity from loss of pay is, like a similar assurance as to the job, essential for actual independence of action on the part of the employee as to organizational matters. But that is not the case with dues paid to an organization later found to have been dominated. At the moment of choice by the employee, his actual independence will be in no way advanced by knowledge that upon such finding, all paid dues will be returned, nor is there any basis for an administrative finding to that effect. The public wrong proscribed by the Act is wholly terminated by performance of an order of disestablishment, and the injunction enforcing that order effectuates the policies of the Act in full by securing actual and absolute freedom of self-organization. To go further is to impose a penalty, which is outside the power of the Board. And that indeed is just what the Board's position here logically means, that it has the power in all cases of a dominated union, with or without the closed shop clause, and whether the dues are checked-off or paid directly, to impose a penalty because of a past violation of the Act although that penalty is powerless to remedy the evil.

5. Causation

Some of the factors dealt with in the argument above clearly raise a bar under the doctrine of proximate causation to the dues reimbursement order. As shown above, there is no evidence or finding, and there has never been any contention, that the Company at any time intruded into the realm of management of the I.O.E. or that the I.O.E. has at any moment since its organization been managed otherwise than by the men themselves in the independent assertion of their own interests as they saw them. The only unfair

labor practice found or charged against the Company was an expression of employer preference as among alternative forms of organization made in the period of choice, and of assistance to the I.O.E. during the period of choice by use of Company premises, etc., and thereafter by the closed shop and checkoff clauses in the I.O.E. Agreement. The maximum scope of that finding, however, leaves the will of the men as the free agent determining what the I.O.E. did during the five years of its existence.

Surely an expression by the management in 1937 of preference as among organizational forms can not in law be considered the proximate cause of the amount, collection or disbursement of dues by the men themselves during that year, still less so in any of the five succeeding years. No administrative finding can obscure the supervening cause embodied in the active exercise of the will of the employees themselves. They, after all, were:

(i) free to abolish the closed shop at any time;

(ii) free to abolish the checkoff at any time;

(iii) free to abolish dues at any time, or to reduce or increase their amount;

(iv) free to refrain at any time from any further expenditures; and

(v) free to determine from time to time what expenditures were to be incurred.

These concepts of causation are long tested methods of the common law for imposing responsibility in the event of private loss and the Congress must be understood (if it had in mind at all the subject of private injury, which is denied) as legislating harmoniously with traditions of such fundamental bearing unless it expresses some different intention.

Their weight in situations like that at bar is increased by two other factors of long appeal to courts of equity, which have been given weight by other Circuit Courts of Appeal, namely, (1) that the employer paid out the checked off sums to other persons, *i.e.*, the union, thus receiving no benefit, or unjust enrichment, from them and (2) the employees, using the funds as they saw fit, derived the whole benefit from them.

6. The Findings of Domination

The foregoing considerations are believed to dispose of the issue. Should it, however, be the view of the Court that the Board may compel dues reimbursement in any case of a dominated union, at least if the dues are paid through a checkoff, then it is respectfully submitted that the Board's findings of domination, interference and support by the Company in respect of the I.O.E. are unsupported by the evidence and should, with the related provisions of the order, be denied effect for the purposes of the dues reimbursement clause, that being the only part of the Board's order now sought to be set aside.

The previous opinion of this Court is believed to hold that the words of the two management communications, the bulletin of April 26 and the address of May 24, fully informed the men of their absolute organizational freedom. That being so, a basic premise of the case has been settled adversely to the Board's decisions. The only new incidents advanced in the present decision are, as shown in the outline of the facts above, insubstantial. The elaboration in the Board's present presentation of the bulletin and the address contains no element of fact from which any meaning may reasonably be inferred contrary to the plain message of the words themselves. The Board's own decision, therefore, is proof that the case contains nothing significant not already

presented in its 1940 decision which this Court deemed unsuitable for enforcement.

The dues reimbursement clause should not, therefore, be sustainable by any of the findings of domination, interference, or support or by the disestablishment order.

SUBMISSION

It is therefore respectfully submitted that paragraph (e) of Section 2 of the Board's order (S.R. 61), requiring dues reimbursement, is beyond the power of the Board and accordingly invalid and that the decree below (S.R. 78), so far as enforcing that requirement, should be reversed.

Respectfully submitted,

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APPENDIX A

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. A., Sec. 151, *et seq.*):

* * * * *

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8 It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: PROVIDED, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: PROVIDED, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a

condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

Prevention of Unfair Labor Practices

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

APPENDIX B

Requirements for the reimbursement of dues collected by means of a checkoff have been considered, aside from the case at bar, in eleven cases by the Circuit Courts of Appeal in five circuits. All of them have set aside such a requirement as being beyond the power of the Board, only one Judge dissenting in one case. Closed shop agreements, or comparable provisions or policies providing for preferential treatment of union members, were involved, as stated below, in all but four of these cases, and in one or more cases in each of the five circuits except the Tenth Circuit.

Second Circuit

Western Union Telegraph Co. v. *N.L.R.B.*, 1940, C.C.A. 2, 113 F. 2d 992, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of The Western Union Telegraph Company—a corporation, and American Communications Association*, 1939, 17 N.L.R.B. 34.

In the union agreement (Section 1) the company undertook "to hereafter prefer for employment those applicants for positions who indicate their willingness to become members of the Association" and agreed not to discharge "any member of the Association from its employment without adequate cause" (see 17 N.L.R.B. 75 and also 53 and 74-79). This preferential policy toward Association members was implemented by supplemental memoranda, e. g., an agreement to reinstate all employees who had been released from service since January 1, 1918 "because of undesirable affiliations" upon submission of evidence that they had joined the Association and relinquished the "undesirable outside affiliation" (see 17 N.L.R.B. at 75). The Board found that "by favoring Association members as to terms and conditions

of employment, the respondent attempted to compel membership in the Association" (see 17 N.L.R.B. at 79). The first of these provisions was noted by the court (see 113 F. 2d at 994).

The reasoning of the court was, in outline, as follows:

1. Liability must be justified on the theory of a tort in compelling employees to contribute dues (997).

2. Any such compulsion would apply equally to those who paid directly to the union without the intervention of a checkoff (997).

3. Proof of individual pecuniary damage is essential and is not to be presumed (997).

4. Employer conduct disqualifying the union as a collective bargaining agent does not in itself involve infliction by the employer of pecuniary damage on the individual members (997).

5. There is no evidence that all the employees who directed the checkoff of their dues did so because of coercion (997).

6. The union "was by no means valueless to" the employees (997).

7. The dues paid to the union are not the measure of damages for the wrongful denial of freedom in collective bargaining (997-8).

8. The necessity for proof of individual damage can not be obviated by "sweeping all into one net, the victims and the unharmed together" (998).

9. The dues reimbursement requirement is punitive rather than remedial (998).

Corning Glass Works v. *N.L.R.B.*, 1941 C.C.A. 2, 118 F. 2d 625, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of Corning Glass Works, Macbeth-Evans Division, and Federation of Flat Glass Workers of America*, 1939, 15 N.L.R.B. 598.

The constitution of one of the dominated unions provided, with the assent of the employer, "that in case of permanent reduction of force and subsequent rehiring members of I.M.G.W.U. shall be given preference of employment" (see 15 N.L.R.B. at 604). The by-laws of another provided, with the assent of the employer, "for preference of employment for Shipping and Trucking Union members" and the union agreement provided a preference like the first aforesaid (see 15 N.L.R.B. at 606). The union agreement with a third dominated union also provided a preference like the first aforesaid. The constitution and by-laws of a fourth dominated union provided, with the assent of the employer, "that preference of work shall be given to members of the organization" (see 15 N.L.R.B. at 610). The employer "suggested the insertion of the provision under discussion not only in each of the agreements, but also in the constitutions in which it appears and . . . it did so in order to encourage membership in the respective departmental unions and to discourage membership in other labor organizations" (see 15 N.L.R.B. at 615-16). This provision was noted by the Court in the case of at least one of the dominated unions (see 118 F. 2d at 629).

The case was decided on the authority of the *Western Union Case*, without new reasoning (630).

Sixth Circuit

N.L.R.B. v. *West Kentucky Coal Co.*, 1940, C.C.A. 6, 116 F 2d 816, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of West Kentucky Coal Company and United Mine Workers of America, District No. 23*, 1938, 10 N.L.R.B. 88.

"Practically all employees of the respondent are members of the E.M.B.A. because it has been understood clearly by all of them that such membership is a prerequisite to permanent employment with the respondent" (10 N.L.R.B. at 96). "Membership in the Association is still considered a condition of employment, virtually every employee belonging..." (see 116 F. 2d at 819-20).

The reasoning of the court was, in outline, as follows:

1. The checked off dues were not retained by the employer but were paid over to the union (822-3).

2. Dues reimbursement is not analogous to back pay (822).

3. Under the doctrine of *expressio unius*, back pay is the only money award permitted under the Act (822).

4. The dues reimbursement requirement is punitive rather than remedial (822).

5. There is no proof of injury, either by non-consent on the part of the employees or by absence of countervailing benefit to them (823).

Judge Arant dissented on the following grounds:

(a) The checkoff was, in the circumstances, an unfair labor practice and Judge Arant "can not say the policies of the Act will not be promoted by the requirement".... (820).

(b) Discouragement of checkoffs for dominated unions would effectuate the policies of the Act (820).

(c) Dues reimbursement is analogous to back pay (820-1).

(d) The wrong being public in character, no proof of damages is required (821).

(e) Dues reimbursement would sever economic ties to the dominated union, thus completing its disestablishment and eliminating a bar to free choice in the approaching election ordered by the Board (821). [A representation proceeding was consolidated with the complaint proceeding (818-19), and the Board order ordered an election as well as disestablishment.]

(f) It is for the Board, and not the court, to determine the form of the remedy unless there is abuse of discretion (821).

N.L.R.B. v. *U. S. Truck Co., Inc.*, 1942, C.C.A. 6, 124 F. 2d 887, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of U. S. Truck Company, Incorporated and International Union, United Automobile Workers of America, Local 174*, 1939, 11 N.L.R.B. 706.

"An oral agreement between the Benefit Union and the respondent provided for a closed shop . . ." (see 11 N.L.R.B. at 713).

The reasoning of the court was, in outline, as follows:

1. The checked off dues were not retained by the employer, but were paid over to the union (890).

2. "The statute contains no provision authorizing the Board to make such an order" . . . (890).

3. Dues reimbursement is not analogous to back pay (890).

4. The asserted power is punitive and not corrective (890).

N.L.R.B. v. *Gerity Whitaker Co.*, June 1, 1942, C.C.A. 6, No. 9194, 10 Labor Relations Reporter, 494 (not otherwise reported), *cert. den.* February 15, 1943, 87 L. Ed. 515, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of Gerity Whitaker Co., et als*, 1941, 33 N.L.R.B. 393.

The union contract provided for a closed shop (see 33 N.L.R.B. at 410-11).

The case was decided on the authority of the *West Kentucky Coal Case* and the *U. S. Truck Case*, without new reasoning.

Seventh Circuit

N.L.R.B. v. *J. Greenebaum Tanning Co.*, 1940, C.C.A. 7, 110 F. 2d 984, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of J. Greenebaum Tanning Company and National Leather Workers Association, Local No. 43, affiliated with the C.I.O.*, 1939, 11 N.L.R.B. 300.

The union agreement provided for a closed shop (see 11 N.L.R.B. at 310 and 110 F. 2d at 986).

The reasoning of the court was, in outline, as follows:

1. The dues reimbursement requirement can not contribute anything to the effectuation of the policy of the Act (988 and 989).

2. The dues reimbursement requirement "might have a deterrent effect generally in respect to the checkoff practice," but that is not sufficient to support it (988-89).

3. The employer's unfair labor practices did not compel the payment of dues to any greater degree than if they had been paid directly to the union (988).

4. Disestablishment will be a complete remedy and the past help to the union from the checkoff thereupon ceases to be significant (988-9).

5. Dues reimbursement will not diminish any existing financial stake, for the result will only be that "the employees get back the amount of their dues without diminishing the financial resources of the treasury of the Association" (989).

6. Dues reimbursement is not analogous to back pay, for that is definitely authorized by the Act and obviously remedial and necessary to insure the effectuation of the policy of the Act (989).

7. The dues reimbursement requirement is punitive rather than remedial (989).

A. E. Staley Mfg. Co. v. *N.L.R.B.*, 1941, C.C.A. 7, 117 F. 2d 868, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of A. E. Staley Manufacturing Co. and United Grain Processors, Local 21490 (AF of L)*, 1940, 22 N.L.R.B. No. 31.

Apparently there was no closed shop provision.

The case was decided on the authority of the *Greenebaum Case* without new reasoning. The authority of the case is diminished by the fact that the disestablishment order was set aside.

Reliance Mfg. Co. v. *N.L.R.B.*, 1942, C.C.A. 7, 125 F. 2d 311, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of Reliance Manufacturing Co. and Amalgamated Clothing Workers of America, et als.*, 1941, 28 N.L.R.B. 1051.

Apparently there was no closed shop provision (thus see 28 N.L.R.B. at 1145 and 1166).

The case was decided (319) on the authority of the *Greenebaum Case*, the *Staley Case*, the *Western Union Case* and the *Continental Oil Case*, without new reasoning.

Eighth Circuit

Kansas City Power & Light Co. v. *N.L.R.B.*, 1940, C.C.A. 8, 111 F. 2d 340, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of Kansas City Power & Light Company and International Brotherhood of Electrical Workers, Local Union B-412*, 1939, 12 N.L.R.B. 1414.

The union agreement provided for a closed shop (see 12 N.L.R.B. 1432-33 and see 111 F. 2d at 346).

The reasoning of the court was, in outline, as follows:

1. The proposal for the checkoff "originated with the Association, was opposed by the company and conceded only upon demand of the Association" (348).

2. The dues were fixed and used by the union alone (348).

3. The company did not originate the union but the domination resulted from a prior dominated union "carrying over an influence which might affect the entire freedom of employees to choose their bargaining agent" (348).

4. There is no evidence of objection to checkoff except that some employees preferred, and were permitted, to pay their dues directly (348).

5. In the circumstances, dues reimbursement has "no relation to the effectuation of any policies of the Act" (348).

N.L.R.B. v. *Southwestern Greyhound Lines, Inc.*, 1942, C.C.A. 8, 126 F. 2d 883, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of Southwestern Greyhound Lines, Inc. and Brotherhood of Railway Trainmen*, 1940, 22 N.L.R.B. 1.

Apparently there was no closed shop.

The reasoning of the court was, in outline, as follows:

1. The dues reimbursement is punitive and penal and not remedial (887).

2. The dues reimbursement requirement has, in the circumstances, " 'no relation to the effectuation of any policies of the Act' " (887).

3. There was no discrimination by the employer because of the method in which the employees paid their dues (887).

4. The company did not institute or insist upon a checkoff and the employees were free to revoke their assignments of wages and pay their dues directly (887).

5. The basic evil which was entitled to correction was "not the mere manner of the payment of dues, but the fact that an employee should at all feel obligated to belong to an organization . . ." (887).

6. The dues reimbursement requirement has, in the circumstances, no greater validity than a requirement for dues reimbursement in any case of a dominated union, no matter how the dues were collected (887).

Tenth Circuit

N.L.R.B. v. *Continental Oil Co.*, 1941, C.C.A. 10, 121 F. 2d 120, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of Continental Oil Company and Oil Workers International Union, Local No. 231 (C.I.O.)*, 1940, 22 N.L.R.B. No. 9.

Apparently there was no closed shop.

The reasoning of the court was, in outline, as follows:

1. Dues reimbursement is penal and not remedial (125).

2. Dues reimbursement "would in no wise tend to remove the effect of the wrongful conduct . . . That is accomplished wholly and completely by requiring disestablishment . . ." (125).

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No. 709

IN THE

Supreme Court of the United States

October Term, 1942

VIRGINIA ELECTRIC AND POWER COMPANY
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

On Writ of Certiorari to
The United States Circuit Court of Appeals
For the Fourth Circuit

REPLY BRIEF FOR VIRGINIA ELECTRIC AND POWER COMPANY

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REPLY BRIEF FOR VIRGINIA ELECTRIC AND POWER COMPANY

I.
INTRODUCTION

The brief for the Board does not attempt any direct reply to the Company's analysis of the relation between the reimbursement order here in issue and the effectuation of the policies of the Act. Nor does the Board even attempt any answer to the views expressed by the five Circuit Courts of Appeal which have in about twice that number of cases held dues reimbursement to be beyond the power of the Board (Petitioner's main brief p. 14 and Appendix B thereto). Rather than by any precise consideration of the causative setting for the closed shop and check-off or of the consequences of the remedy sought to be imposed, counsel for the Board have thought it expedient to support their case by enlarging their complaints against the Company's past conduct.

Those claims are in many instances enlarged beyond the findings of the Board on the authority of counsel alone contrary to the clear preponderance of evidence. Some word of correction as to the factual background will therefore be needed at the outset, in order to reestablish the history with some measure of its real proportions. That will be considered in Part II below.

Petitioner's main brief is believed to anticipate and answer most of the positions taken by the Board and there is no need, since the Board attempts no direct reply to its successive positions, to go through them here *seriatim*.

The Board's discussion seems to rest on two pivotal misconceptions: For one, the Board takes the view that if an employer has offended any of the policies of the Act in any

particular, he may be charged with responsibility for anything that may be done thereafter by any one else, even though the employer was powerless to prevent the act in question; specifically that an employer, if guilty of disclosing a preference among organizations so that the men "were not as free as the statute requires" (S. R. 36), he thereby becomes responsible for all dues that the employees may thereafter fix and require to be paid, and is liable for their repayment, whether payment was made willingly by the men or not and whether the results were beneficial to them or otherwise. The untenability of that view under any doctrine of causation and under any reasonable concept of responsibility under the Act is examined in II, 1 below.

The other pivotal misconception of the Board is the view, ably argued, that the repayment of checked-off dues is analogous to reimbursement of back pay. The errors of that assumption will be examined in II, 2 below.

No further argument is believed necessary on the point that the Board's findings of domination, if review of them be necessary, are unsupported. A comparison of its 1942 decision with its 1940 decision, in the light of the brief travel-guide provided in petitioner's main brief (pp. 4-10), shows that the main basis of the Board's decision is still the bulletin of April 26, 1937 and the speech of May 24, 1937, which this Court has held not in themselves to support an adverse finding. It seems apparent that the other incidents relied on by the Board were incapable of exerting any general influence on the men or of altering the plain meaning of those two executive messages (see petitioner's main brief at pp. 36-37)*.

*The Board does not seem justified in saying (Board's brief, p. 22) that the court below passed on the facts independently, for the court's opinion shows that it felt constrained to the result it reached by what it believed to be a "clear intimation of the Supreme Court as to the sufficiency of the evidence to sustain a finding of domination" (S. R. 70).

II.
THE FACTS

1. The Board's Brief Overstates the Facts

The Company respectfully believes that the Board's findings and conclusions are not supported by evidence and are not permissible in law and therefore should be disregarded. But assuming, for this phase of the argument, that the Board's findings were permissibly made, surely it should be a sufficient statement in behalf of the Board to summarize what its findings actually were. This was not done.

Thus the Board's brief says that in one of the employee meetings at which representatives were chosen to hear the May 24 address, the presiding supervisor appealed to the men to form an unaffiliated union (Board's brief, p. 9, n. 11*). This was not found by the Board. It was denied by the presiding supervisor (R. 554 and 556) and by two of the employees present (R. 636 and 675). Various employees are said to have understood that the May 24 address required them to form a company union (Board's brief, pp. 9-10, n. 12), but that was not found by the Board and no reference is made to other employee testimony that no such impression was derived: e. g. "the only thing he said was they were willing to cooperate with any organization" (R. 586) and "... we decided it didn't make any difference how we wanted to organize, independently or CIO or AF of L, or either way" (R. 800; and see R. 636, 704 and 721 and 722). The Board's brief says that when this address was reported by those representatives to the men at large at various meetings throughout the system, the reporting representative at one meeting said it was the Company's desire that they form a company union (Board's brief, pp. 11-12, n. 16). This was not found by the Board and is contrary to the testimony of

*The Board's brief has been seen only in page proof. The final pagination may vary.

the reporting representative (R. 676-677) and one of the leaders of the meeting (R. 590).

When the I. O. E. membership campaign got under way, we are then told that two superintendents participated in obtaining a membership card from a recalcitrant employee (Board's brief, p. 13, n. 20). This was not found by the Board. It was categorically denied (R. 537-538). One of the leaders of the I. O. E. movement is said to have made a speech claiming that the company would favor it, but would oppose other organizations (Board's brief, p. 14, n. 20). This was not found by the Board. It was denied by one of the attending employees (R. 802).

Coming then to the bargaining conference with the I. O. E., it is said that the proviso to the check-off, added at the Company's insistence, which entitled any employee to revoke his assignment of wages at any time, was admitted to be meaningless (Board's brief, p. 15, n. 21).* That was not found by the Board. The statement was made with the existing by-laws of the I. O. E. as a premise, which required payment of dues through the check-off. The provision was far from meaningless, however, for it was competent for the I. O. E. to change its by-laws by its own action at any time (R. 855) and, upon a change by it in this respect, the check-off would become individually optional.

Emphasis is laid on the instruction that A. F. of L. organizers should not solicit on Company time and property (Board's brief, p. 6, n. 8 and pp. 16-17), but the brief does not mention that identical instructions were issued to the whole supervisory staff with respect to all organizing efforts

*For convenience, the check-off clause, the closed shop clause, the by-law which made utilization of the check-off mandatory, the by-law providing the procedure for amendments and the form of application for membership in the I. O. E. (and assignment of wages attached thereto) are set out in the Appendix hereto.

(R. 289-290, 319-320).* Violations of these instructions were committed by the complaining unions** as well as by the I. O. E. The impertinent conduct of Mann, the discharge which followed from it being urged as a discrimination against affiliated unions, is urbanely referred to as a failure to use the prefix "Mister" with respect to Bishop "in discussions with other employees" (Board's brief, p. 17), thus ignoring the critical facts, though there was no dispute in regard to them. Mann had come into an office crowded with employees and demanded in a loud and angry tone "Anybody seen this guy Bishop around here?" and refused to apologize to Bishop, whom he then saw to be present, despite the fact that this was generally regarded by the men, both those present at the time and others, as a challenge to Bishop's authority.*** Even General Foreman May is said to have made a threatening remark about the A. F. of L. (Board's brief, p. 17, n. 24), though the Board did not so find and May clearly did not do so (R. 518-519).

We do not ask the Court to review these scattered incidents and determine the true facts. They are given merely as illustrations of the over-zealous presentation in the Board's brief, which can not, in consequence, be accepted as a wholly accurate summary of the factual background. The following uncontroverted points of fact will, however, at least provide some measurable frame for the picture.

2. Uncontroverted Facts

The instances of interference mainly relied on relate only to two employees (Bishops and Edwards), both of them

*The I. O. E. organizers had indeed instructed their own men to the same effect (R. 596-598, 645-646; and see R. 600-602, 683-684, 728 and 737). It is of interest that the full management reply to the A. F. of L. organizers was that they were perfectly free to do as they wished, but not to solicit on Company property or time (R. 350-351, 370-372, 428-429, 448).

**R. 155-156, 178-179, 669-671, 684, 709-710, 730-732, 793-794.

***R. 392-934, 407-410, 442-447, 811-814.

supervisors of the Company's transportation operations in Norfolk. No such instances were found by the Board in other departments or in other communities. It does not seem to be claimed that such conduct had any influence outside its immediate neighborhood, and it can not be seriously urged that it had any substantially intimidating effect on the witnesses who testified concerning it, for all but one of them freely joined, and maintained memberships in, one or more of the complaining unions (R. 235-236, 151, 164-165, 245-247, 149, 150-151, 114, 137).

No claim is made, in the Board's brief or in its findings or anywhere else, that there was at any time any intrusion by the Company into the management of the I. O. E. or that its affairs were ever conducted otherwise than by the men themselves in the independent assertion of their own wishes. Thus there has never been any attack on the opinion of the court below on the first hearing (R. 1012) that:

> ". . . it is not contended that the company . . . dominates it [the I. O. E.] in any way or in any way interferes with the control exercised over it by its members."

There is no claim that the Company was guilty of any domination, interference or support in any way after the organization of the I. O. E. except through the closed shop and check-off clauses of the trade agreement. The only claim, aside from the closed shop and check-off clauses, is that the Company, while proclaiming the freedom of the men to do as they wished, nevertheless disclosed a preference as among competing forms of organization at the time when a choice was being made.

It is further undisputed that the Company did not initiate the proposals for the closed shop or the check-off, but both of them originated with the men themselves. The Board has found that the Company agreed to the check-off only with a

proviso entitling each employee to revoke his assignment (S. R. 32) and this automatically left continuation of the check-off to such provision as the I. O. E. by-laws might from time to time contain as to the method for the payment of dues and, if so permitted by the by-laws, to the individual choice of each employee. The evidence is unarguable that the Company resisted the request for the closed shop clause with determined opposition (R. 264-265, 296-297, 314, 446, 619). Thus there has never been any attack on the opinion of the court below at the first hearing (R. 1012) that

> "Two matters were the subject of much controversy, the amount of the wage increase and the closed shop provision. Both were the subject of compromise. . . . The Company opposed the provision for the closed shop, but acceded to it on condition that membership in the association should not preclude membership in any other labor organization that the men might desire to join."

While the Company yielded in deference to the intransigent demand of the I. O. E. and as a part of a general settlement of the controverted issues, it never withdrew its opposition and sought abolition of the closed shop when negotiations for a renewal contract were begun a year later (R. 461).

Finally, it is uncontroverted that the Company on three occasions, which opened and punctuated the period of actual organization, in good English words stated that:

> "The Company recognizes the right of every employee to join any union that he may wish to join, and such membership will not affect his position with the Company" (Bulletin of April 26, 1937, R. 35).
>
> "The Company wants to make it perfectly clear that its policy is one of willingness to bargain with its employees in any manner satisfactory to the majority of

its employees and that no employee will be discriminated against because of any labor affiliations he desires to make" (Address of May 24, 1937, R. 823).

"Employees of Virginia Electric and Power Company have a right to self-organization, to form, join, or assist labor organizations and to bargain collectively through representatives of their own choosing, and the Company has not sought and does not seek to dominate or interfere with employees in the exercise of any of their rights, individually or collectively" (Bulletin of June 24, 1937, R. 861).

The effort of the Board's brief is to deepen the culpability of the Company so that no form of punishment may seem too grave. Unique iniquity, it urges, calls for unique remedy. But that surely is not a tenable view of the circumstances shown in this record. If any index extrinsic to the facts themselves were needed to show that if the Company was culpable in law it was so only as a borderline case, that would seem to be supplied in good measure by the fact that the Board's original order was set aside in its entirety by the court below on the first hearing, and this court did not enforce it. It is hard to imagine a much more debatable case than one that requires two decisions by each of the three tribunals before its final disposition. This is suggested indeed by the Board itself in the form of its finding that when the employees of the Company "formed the I.O.E. they were not *as free as the statute requires*" (S. R. 36; italics added).

III.
ARGUMENT

1. The Doctrine of Causation

In view of the general denunciations in the Board's brief it will be clarifying to recall just what is the wrong that the Board has found on the part of the Company.

The check-off itself, it should be remembered, while expounded in ominous though indecisive words in the Board's brief (pp. 23, 26, 27), is not intrinsically an evil thing. It is not forbidden by the Act. The very contrast between the failure of the Act to make any such prohibition and the insertion in the preceding year of such a prohibition in the Railway Labor Act*, which is mentioned in the Board's brief (pp. 23-25), emphasizes the legality of the check-off as such under the Act. Not only is it lawful as a matter of statutory construction, but it is unobjectionable as a matter of public policy. That is sufficiently shown by the habit of decision of the National War Labor Board to require a check-off in ordinary circumstances upon appropriate request; for a check-off, the National War Labor Board considers, is so reasonable and appropriate that any union is entitled to it which has not forfeited its claims by improper conduct.** Indeed the National War Labor Board

*49 Stat. 1185, Section 2, Fourth; 45 U.S.C.A., Section 152, Fourth.

**This policy was established in the "Little Steel" Case, *In the Matter of Bethlehem Steel Corporation, et als. and United Steel Workers of America, C. I. O.*, July 16, 1942, Cases No. 30, 31, 34 and 35, 10 L.R.R. 675, 680. There the War Labor Board said:

> "The check-off eliminates the picket lines for collecting dues and their attendant abuses. With a maintenance-of-membership clause, the check-off prevents the necessity for the discharge of a would-be delinquent. As pointed out in the panel report, the check-off will save the time of the union leaders for the settlement of grievances and the improvement of production. This sharing by the company and the union of their common prob-

has just required a check-off by the Company for one of the complaining unions in this case.* It is well known that a check-off, together with some form of requirement for union membership, is one of the most usual and frequent requests that unions make.

So the check-off is not, as such, unlawful under the Act nor is any special consequence attached to it. The Board has no warrant to undo either the check-off or its consequences as such. The pertinence of the check-off for present purposes is wholly as an incident to the statutory offense of dominating a union. It is, of course, one of the innumerable ways in which assistance may be given and such assistance, if sufficient to overcome the independence of the union, becomes domination. But it is only the domination that the Board is entitled to eliminate.

The closed shop clause has a similar status. It is expressly sanctioned by the Act except in the case of a dominated union (Section 8(3)). Likewise it is acceptable from the point of view of public policy: the National War Labor Board customarily requires some form of requirement for union membership, usually either a closed shop or a so-

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lems and their responsibilities for shop discipline and efficient production through the maintenance of a stable membership and the prompt collection of union dues, makes for a better and more cooperative company, and a more responsible and more cooperative union."

This decision has been regarded by the National War Labor Board as setting a uniform pattern and the provisions for a check-off required by that board since have taken a standard form; e.g., *In Re Pickands Mather Mining Company, et als.* and *United Steel Workers of America (C.I.O.)*, March 13, 1943, Cases No. 632 and 632A, 12 L. R. R. 107, 108.

**In the Matter of Virginia Electric and Power Company and The Amalgamated Association of Street, Electric Railway, and Motor Bus Employees of America, Division 1177 (Norfolk), Division 1264 (Portsmouth), and Division 1220 (Richmond), A. F. of L.*, Regional War Labor Board, Third Region, April 20, 1943, Case No. 111-629-D, not yet reported. This decision was by a panel and is subject to the action of the Board.

called maintenance-of-membership clause, which requires continuation of union membership by those who are members at the outset*. Of course there would have been no practical difference here between such a clause and the clause actually employed, for 90% of the employees were members before the trade agreement was negotiated. The National War Labor Board has just required such a clause of the Company**. In result, therefore, the closed shop as such is lawful; it is not as such proscribed; nor are any special consequences attached to it as such. The closed shop can be unlawful only as one of the ways in which assistance may be given which, if sufficient in amount, may constitute domination. As in the case of the check-off, therefore, the Board has no authority to undo the closed shop as such, but only to eliminate the domination that may result in part from it.

These comments assist in identifying the wrong found by the Board. While its ultimate conclusions are expressed, as in the case of any careful drafting, in the words of the statute, and thus do not identify the specific fault, there is no doubt when the rest of the findings and conclusions are examined. There is no finding or conclusion, nor has there ever been any evidence or claim, of any intereference, domination or support on the part of the Company except (i) active manifestation of employer preference in the period of choice ending prior to the formal organization of the I.O. E. on June 15, 1937, or at least prior to the execution of the trade agreement on August 5, 1937 and (ii) subsequent assistance to the I. O. E. by virtue only of the closed shop and check-off clauses of that agreement, they being deemed unlawful as a means of assisting a union for which a pref-

*See cases cited in the second previous footnote.

**See the case cited in the next previous footnote.

erence had been indicated by the Company. But, as pointed out in petitioner's main brief (pp. 24-33), neither the check-off nor the closed shop nor their combination is sufficient to distinguish this case from any case of a union formed by men who "were not as free as the statute requires" (S. R. 36).

This identification of the evil found by the Board marks a fundamental limit of responsibility under any familiar doctrine of causation. There is no finding or evidence or claim that the Company intruded into the management of the affairs of the I. O. E. or in any way restricted or influenced unfettered dominion on the part of its members. Had the Company done so and dictated the decisions of the I. O. E., the Board might well disregard the separate legal form through which the determination and disbursement of dues was ostensibly accomplished and hold it all a part of Company conduct, as is done in similar situations in corporate law: *Chicago, Milwaukee & St. Paul Railway Co.* v. *Minneapolis Civic and Commerce Association*, 1918, 247 U. S. 490, 501; *Consolidated Rock Products Company* v. *DuBois*, 1941, 312 U. S. 510, 523-4. But no such case is presented here. In this case it is uncontroverted that:

1. The employees originated the proposal for, and demanded, the check-off*, and continued it in the trade agreement.

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*This demand was made by sending the Company, with a request for a bargaining conference, a draft of contract, as a specification of the demands made (Board Ex. 8, not printed, which had been prepared in a three day convention by employee representatives from all over the system, advised by their counsel. This draft of contract included the check-off as well as the closed shop (p. 2). There is nothing strange in the fact that the Company considered these demands before the bargaining conference began, as the Board's brief seems to imply (p. 15, n. 21). It would have been insane not to do so. Similarly, the form of application cards and the assignment (see Appendix hereto for forms) of wages which they bore (commented on in the Board's

2. The employees originated the proposal for, and demanded, the closed shop*, and continued it in the trade agreement. Of course without the sanction of the closed shop, the check-off was a mere matter of mechanics of transmission, like the postal system, which any one was privileged to utilize upon his individual choice.

3. The men originated and continued the by-law which alone made the check-off the mandatory method for payment of dues. That by-law could have been amended at any time by a two-thirds vote at two successive regular meetings of the governing board of the I. O. E. (R. 855).

4. The men alone controlled and determined the amount of dues that should be paid from time to time. This likewise was provided for in their by-laws (R. 855), which were subject to amendment, in this particular, as above. The consequences of this fact for any notion of causation, and the scope of responsibility by the Company, is sharply illuminated by the fact that in March, 1938, some seven months after the trade agreement was signed, the governing board of the I. O. E. amended this provision of the by-laws so as to double the amount of dues, increasing them from $3.00 a year to $6.00 a year (R. 576 and Board brief, p. 30, n. 34). These figures, multiplied by the number of employees, make a product of approximately $90,000 for the total period, while the only dues in contemplation at the time when the Board found an unfair labor practice to have been committed, multiplied by the number of employees, would have produced a product of only about $45,000. Is the Company to

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brief, p. 26), was wholly devised by the men or their counsel. There is no suggestion that the Company had any part in preparing them or knew anything about them or was in any way obligated to agree until it executed the trade agreement of August 5, 1937.

*R. 264-265, 296-297, 314, 446, 460-461, 619.

pay $45,000 more because the I.O.E. committee, in whose election it admittedly had no part*, determined, at a meeting in which there is no claim that the Company had any part, to double the amount of dues, for purposes that they alone knew and determined?

5. Finally, the men alone controlled the matter of disbursement and they alone decided whether any disbursements should be made, and if so, for what purposes.

Whatever may be done in other cases, on such a record as this the Company respectfully submits that the men alone are responsible, and not the Company in any degree, for what is complained of, namely, the determination, collection and disbursement of dues. Whether that was in fact advantageous or disadvantageous to the particular individual interests of the I. O. E. members, it was done by a majority of the men. Nothing in the Act makes any conduct by a majority of employees a legal wrong and the Company can not be punished for it. If any wrong was committed by the Company, that has now been wholly remedied by disestablishing the I. O. E. in compliance with the order of the court below. No question is made by the Board as to the sufficiency and completeness of that disestablishment (Board brief, p. 19). The order directing the Company to reimburse the men for back dues should therefore be denied effect.

2. Back Pay is not Analogous

The Board largely relies on the view (Board brief, pp. 33-36) that reimbursement of dues is analogous to reimbursement of back pay. It is believed that any seeming analogy is superficial and unsound.

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*The election was described in detail: Intervener's Ex. 39, R. 938 [introduced at R. 750]; Intervener's Ex. 41, R. 944 [Introduced at R. 751]; R. 79-80, 602-607, 648-652, 684-685, 698-699, 805, 807, 808. This evidence was not questioned.

In the case of back pay, an employee has lost his job and his wages because of discriminatory action against him by the employer for organizational reasons. It is plain that the employee has suffered a loss. It is plain that such loss and its amount were caused by the employer and were due wholly to the employer's offense against the policies of the Act. Union dues stand on a different footing. There has been no discrimination, for all employees have been treated equally. It is far from plain that any individual employee has suffered any actual loss as a consequence of the deduction, for it may well be that he has profited many times over by the advantages gained. If any loss was sustained, it is clear, in cases like that here presented, that neither such loss nor its amount was caused by the employer, but solely by the action of the majority of the employees in fixing, requiring the collection of and disbursing dues. To require reimbursement of such amounts is to require payment for a gravely doubtful injury that, if any occurred, was imposed by some one else. Reimbursement by the employer does not, under such conditions, fall within any concept ordinarily denoted by the term "restitution," which is the original word for this clause in the Act.*

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*The Act as originally introduced (S. 1958, see Vol. 79 Congressional Record, 2368, Feb. 21, 1935) provided in what is now Section 10 (c) that the Board should have power to enter

> "... an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including restitution, as will effectuate the policies of this Act."

This was amended in the Senate Committee on Education and Labor (74th Congress, 1st Session, Senate Report No. 575, p. 15) into its present form, namely:

> "... an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

So in lieu of "restitution," Congress substituted "reinstatement of employees with or without back pay," being "the most frequent form of

There is a further difference between back pay and dues which is vital from the point of view of effectuating the policies of the Act, in itself the essential criterion of Board power. Knowledge of immunity from loss of job and pay because of union sympathies or affiliations is essential to independence on the part of the employee. But knowledge on the part of an employee that dues paid to a dominated union will be reimbursed can not make him any the less willing to become a member of that union when invited, or to remain a member afterwards. By every normal expectation, if such knowledge had any motivation it would be to the opposite effect, making him more, rather than less, willing to join and remain a member. This point, stressed in petitioner's main brief (pp. 20-22), is not questioned in the Board's brief.

The only answer attempted by the Board in that regard is the assertion that such knowledge on the part of an employee would make him more willing to join an *additional* union while remaining a member of the dominated union (Board brief, pp. 37-38). But this is not a realistic view for two reasons.

In the first place, the problem to the employee is a cash problem, wholly unrelated to the accounting concepts of corporate income on an accrual basis. The possibility that there may be an ultimate refund of dues to one union could have no substantial motivation toward simultaneously paying out cash as dues to another union, especially since such repayment, quite aside from its position in time, must necessarily remain uncertain in event, for the Board has declared

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affirmative action required in cases of this type" (74th Congress, 1st Session, House Report No. 972 of the Committee on Labor, dated May 21, 1935, p. 21). If the substitute words are merely illustrative, the original word is still informative. Otherwise the substitute words, mentioning only one form of money award, would inferentially exclude any other form of money award.

that dues reimbursement is not an automatic remedy but is one to be administered by it in its discretion according to the varying facts of particular cases.*

More fundamentally, however, there is no reason, as such things go in the practical world, to pay dues to any additional union so long as the first union has an exclusive bargaining contract, for the second union could not accomplish anything. This does not mean, however, that the employee is tied to the recognized union. On the contrary, he has a remedy, appointed by the Act (Section 9(c)), specially fashioned for his need, and readily available from the Board. That remedy is a petition to the Board for an election. There is nothing in the statute or in the Board's rules of practice which requires that dues be paid to any competing union in order to procure an election; any substantial manifestation of allegiance is sufficient, such as by a signed paper authorizing a competing union to represent the signer should it be successful in obtaining majority representation. Nor does the existence of a trade agreement between the first union and the company prevent an election; if the Board finds that the first union is dominated, it disregards the contract; but even if the first union is independent, or has not been found to be dominated, the contract is not deemed a bar to an election except in so far as the Board considers that appropriate for the fullest encouragement of the procedure of collective bargaining, weighing, among other considerations in that regard, the stability of employment relations. The Board's policy in this connection is clearly stated in its latest annual report:

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*Thus it was said in the Board's 1941 brief before this Court (p. 47, n. 36) that the Board's previous practice of uniformly requiring dues reimbursement had been modified "so that the Board now considers each case individually on its own facts and circumstances and on that basis determines whether a dues reimbursement provision is, or is not, appropriate."

"The Board is frequently presented with the question whether to order an election for choice of representatives in the presence of a collective bargaining contract. The Board in such cases must weigh and resolve the conflicting interests in maintaining the stability of contractual relationships established by previous collective bargaining and in protecting the right of the majority of employees to a collective bargaining representative of their own choice.

"The Board has, however, ordered elections in the presence of such valid contracts, where the entire record indicates that to do so will encourage the practice and procedure of collective bargaining, and protect the exercise by workers of their full freedom to organize and designate collective bargaining representatives of their own choosing. Among the considerations which in particular cases have resulted in Directions of Elections are the fact that the contract was about to expire, or was terminable on notice, or that it had been in existence for more than a year. Similarly, where there was doubt of the current existence of the contracting union, or where the local union had split and the employer refused to recognize either faction, or where there was evidence of substantially complete change of affiliation of the employees concerned, the Board has ordered elections." (Seventh Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1942, p. 54).

This remedy of election is thus readily available to the men and will be utilized by the Board whenever in its discretion it deems it suitable. That can be done speedily, for no judicial review is permissible until after the completion of the election and until a refusal, if any, to bargain with the resulting representative. This remedy and its availability fully effectuate the policies of the Act. If employees are dissatisfied but slumber on their preferences, no policy of the Act requires that they should be able later on to make the

Company pay for their delay. Indeed such a privilege would promote improper dealing, for it would encourage dissatisfied employees to slumber on their feelings not only peacefully but deliberately, availing of the union to obtain all the benefits it could obtain but expecting, should it be held dominated, to receive all their previous dues as a liquidating dividend. To encourage such kind of bargaining would not effectuate the policies of the Act. *N. L. R. B.* v. *Fansteel Metallurgical Corp.* (1939) 306 U. S. 240.

The ready availability and completeness of the remedy of an election fully satisfy the policies of the Act in this regard and make unnecessary the creation of some new remedy by a money award in circumstances like those at bar.

These conclusions are not to be varied by any verbal argument on the part of the Board that compensation for loss need not be limited to the amount of actual loss, because the legislature has fixed a measure of liquidated damages in some cases (e. g., *Overnight Motor Co.* v. *Missel,* 1942, 316 U. S. 572, 583, Fair Labor Standards Act). The legislature may, of course, prescribe any reasonable formula as a conclusive determination of liquidated damages. But in the absence of legislative action, an administrative agency, seeking to compensate for losses, can go no further than the amount of the actual loss (*Republic Steel Corp.* v. *N. L. R. B.,* 1940, 311 U. S. 7). *Acton* v. *B. & O. S. W. R. Co.,* 1915, 59 Ind. App. 280, 108 N. E. 535, "allowing," as the Board says (Brief, p. 43, n. 43), "recovery of the full amount of wages checked off to an illegal relief association without any allowance of credit for the benefits actually paid by the relief association to the employee" did not involve any such question. That was an action to recover the amount of wages checked off for relief association dues; the answer set up the existence of the association and the plain-

tiff's membership; a judgment overruling a demurrer to that answer was reversed, the Appellate Court expressly saying:

> "There is no averment that appellant ever received any benefits from the association." (108 N. E. at 536).

IV.
SUBMISSION

It is therefore respectfully submitted that paragraph (e) of Section 2 of the Board's order (S. R. 61), requiring dues reimbursement, is beyond the power of the Board and accordingly invalid and that the decree below (S. R. 78), so far as enforcing that requirement, should be reversed.

Respectfully submitted,

T. JUSTIN MOORE,
GEORGE D. GIBSON,
Attorneys for the Company

Dated May 4, 1943.

HUNTON, WILLIAMS, ANDERSON,
GAY & MOORE,
Electric Building,
Richmond, Virginia
Of Counsel.

APPENDIX

The Check-Off Clause

[I. O. E. AGREEMENT OF AUGUST 5, 1937, R. 828]

"The Employer agrees to accept a written order signed by any member of the Employee Organization authorizing the Employer to deduct from that member's wages the amount therein specified and to pay to the Employee Organization said amount less the Employer's cost of making such deduction. Any such order may be revoked at any time by notice in writing given by the employee of the Employer."

The Closed Shop Clause

[I. O. E. AGREEMENT OF AUGUST 5, 1937, R. 827-8]

"During the term of this agreement, the Employer hereby agrees not to retain in its employment for a period of more than ninety days after the date of this agreement any employee eligible for membership in the Employee Organization, unless such employee is a member of the Employee Organization. The Employee Organization agrees to furnish to the Employer within five days after the signing of this agreement a complete list of all members of the Employee Organization and thereafter to keep said membership roll so furnished to the Employer currently up to date.

"Nothing contained in this agreement shall prevent or in any wise affect the right of any employee to join or remain a member of any other labor organization."

I. O. E. By-Law as to Dues

"ARTICLE II.—DUES

"Each member of the Organization shall pay dues to the Organization in the sum of Three Dollars ($3.00) per year, payable semiannually in July and January in advance. Each member shall direct the proper disbursing officer of the Company to deduct the amount of such member's dues from his wages, and pay the same, less the employer's cost of making such deduction to the Treasurer of the Organization . . ." (R. 855.)

I. O. E. By-Law as to Amendments

"ARTICLE III.—AMENDMENTS

"Any provision of these by-laws may be amended, altered, or repealed by a two-thirds vote of all of the members of the General Committee of the Organization at two consecutive regular meetings of the Committee." (R. 855.)

I. O. E. Membership Card

[R. 843]

I HEREBY APPLY FOR MEMBERSHIP IN THE INDEPENDENT ORGANIZATION OF EMPLOYEES OF VIRGINIA ELECTRIC & POWER COMPANY

and I hereby expressly bind myself to abide by the constitution and bylaws of that organization. I hereby empower that organization and the General Committee of the organization, as the supreme body of the organization, to act as my bargaining agency to negotiate with the management of the Virginia Electric & Power Company on matters relating to wages, hours of work, safety, sanitation, working conditions, and all other matters involving the relationship of Virginia Electric & Power Company with its employees.

Given under my hand this ..... day of .....

.....

(Sign name here)

To Virginia Electric & Power Company:

The Virginia Electric & Power Company will please pay to the Treasurer of the Independent Organization of Employees of Virginia Electric & Power Company *$3.00 per year, in semi-annual installments, in advance, less the cost of making such deductions* and deduct the said sum of $3.00 from my salary, until this assignment is revoked in writing by me.

no dollars

Dated:.....

.....

(Sign name here)

Notice of the above assignment is hereby acknowledged, and the above amounts will be paid, as directed.

VIRGINIA ELECTRIC & POWER COMPANY

By

.....

Dated:.....

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513389—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 709

VIRGINIA ELECTRIC AND POWER COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinions of the court below (S. R. 62–78) [1] are not yet reported. The findings of fact, con-

[1] Throughout this memorandum the same method of referring to the record as used by the Company in its petition is followed: "R" refers to the printed transcript of record heretofore filed in this Court, when this case was previously before the Court, October Term, 1941, Nos. 25 and 26; "S. R." refers to the transcript of record filed in this Court containing the principal proceedings had subsequent to the filing of the transcript of record in this Court in the earlier proceeding.

clusions of law, and order of the Board (S. R. 13–62) are reported in 44 N. L. R. B. 404.

JURISDICTION

The decree of the court below was entered on December 9, 1942 (S. R. 78–79). The petition for a writ of certiorari was filed on February 4, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. The Board found that the petitioner dominated, interfered with and supported a labor organization of its employees, entered into an agreement with that organization providing for a closed-shop and check-off of dues for the purpose of securing that organization's financial stability, and coerced its employees to authorize the check-off by making it a condition to retaining their jobs, thereby committing unfair labor practices in violation of Section 8 (1) and (2) of the Act. The question is whether in these circumstances the Board properly required the petitioner to reimburse its employees for the sums of money which the petitioner deducted from their wages and paid over to the dominated labor organization as their dues.

2. Whether there is substantial evidence to support the Board's findings of fact that petitioner dominated, interfered with and supported a labor organization of its employees. This question is presented only to the extent, if any, that may be pertinent to examination of the first question.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

On February 27, 1940, the Board, after the usual proceedings, issued an order against the Virginia Electric and Power Company, herein called the Company (R. 952–980). Upon petitions by the Company and by the Independent Organization of Employees of the Virginia Electric and Power Company, herein called the I. O. E., to review and set aside the Board's order, the court below, in an opinion (115 F. (2d) 414) issued on November 12, 1940, set aside and refused to enforce the order (R. 1005–1019). Thereafter, this Court granted writs of certiorari and in an opinion (314 U. S. 469) issued on December 22, 1941, reversed the decision of the court below and directed that the cause be remanded to the Board for a redetermination of the issues in accordance with the opinion of this Court (S. R. 1–10). Upon the remand of the case, the Board

reconsidered the entire case upon the original record and on September 24, 1942, issued a new decision (44 N. L. R. B. 404) containing its findings of fact, conclusions of law, and order (S. R. 13–62).

In substance the Board found that the Company had engaged in espionage through the use of a full-time undercover operative furnished by the Railway Audit and Inspection Company (S. R. 23, 36; R. 56–59, 198–201, 331–333, 370, 399–400);[2] interrogated employees to discover their union activities (S. R. 23–25, 36; R. 63–64, 83–84, 93, 400, 403–404, 820–821); discharged an employee because he advocated affiliation with an "outside" union (S. R. 49–50; R. 115, 128, 140–141, 143–144, 379, 381, 394, 397–398, 409); dominated and interfered with the formation and administration of and contributed support to the I. O. E. (S. R. 23–48; R. 45, 53, 155–156, 193, 385, 435, 454–455, 587, 600, 667, 676–680, 683, 727–728, 742–745, 754, 761–762, 782–783, 790–791, 914–915, 927–934); entered into an agreement with the I. O. E. providing for a closed-shop and check-off of dues (S. R. 32–33; R. 260, 345, 875–877, 826–839, 303–304, 265); coerced employees into authorizing the check-off as a condition to retaining their jobs (S. R. 41, 54–55; R. 76–77, 155–156, 184, 193, 205–206, 828, 843, 855); and pur-

[2] References preceding the semicolons are to the findings of the Board. Succeeding references are to the supporting evidence.

suant to the provisions of the closed-shop contract discharged two employees because they refused to become members of the I. O. E. (S. R. 50–51; R. 172–173, 181, 267–268), thereby engaging in unfair labor practices in violation of Sections 8 (1), (2) and (3) of the Act (S. R. 59). The Board's order required the Company to cease and desist from the unfair labor practices found and from giving effect to its contract with the I. O. E. (S. R. 59–60). In addition the Board's order affirmatively directed the Company to withdraw all recognition from and completely disestablish the I. O. E. as a representative of its employees, to reinstate two of the three employees found to have been discriminated against,[3] to reimburse its employees in the amount of dues checked off their wages on behalf of the I. O. E. and to post appropriate notices (S. R. 59–62).

The Company and the I. O. E. again petitioned the court below to review and set aside the Board's ordered (S. R. 62–63). The court on December 9, 1942, rendered an opinion and entered a decree enforcing the Board's order in full (S. R. 62–79). Judge Soper dissented with respect to enforcement of that portion of the Board's order requiring the Company to reimburse its employees for dues checked off to the I. O. E. (S. R. 76–78).

[3] For reasons fully set forth in its decision (S. R. 57–58) the Board found that it would not effectuate the policies of the Act to order the reinstatement with back pay of one of the employees found to have been illegally discriminated against.

ARGUMENT

1. While, for reasons more fully set out in our brief filed with this Court in an earlier phase of this case (Nos. 25, 26, last Term, pp. 43–49), we believe that the decision below is correct, we agree with the petitioner that the decision, insofar as it enforces the provision of the Board's order requiring the Company to reimburse its employees for dues checked off to the I. O. E., presents an important question which has not been but should be settled by this Court.[4] We, therefore, join with petitioner in requesting that a writ of certiorari issue to review that portion of the decision below which enforced the provision of the Board's order respecting reimbursement for dues checked off.

2. Petitioner also urges review of the question whether there is substantial evidence to support

[4] Other circuit courts of appeals, under varying circumstances, have refused to enforce similar provisions. *Western Union Telegraph Co.* v. *National Labor Relations Board*, 113 F. (2d) 992 (C. C. A. 2); *Corning Glass Works* v. *National Labor Relations Board*, 118 F. (2d) 625 (C. C. A. 2); *National Labor Relations Board* v. *West Kentucky Coal Co.*, 116 F. (2d) 816 (C. C. A. 6); *National Labor Relations Board* v. *United States Truck Co.*, 124 F. (2d) 887 (C. C. A. 6); *National Labor Relations Goard* v. *J. Greenebaum Tanning Co.*, 110 F. (2d) 984 (C. C. A. 7); *A. E. Staley Manufacturing Co.* v. *National Labor Relations Board*, 117 F. (2d) 868 (C. C. A. 7); *Reliance Manufacturing Co.* v. *National Labor Relations Board*, 125 F. (2d) 311 (C. C. A. 7); *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. (2d) 340 (C. C. A. 8); *National Labor Relations Board* v. *Southwestern Greyhound Lines, Inc.*, 126 F. (2d) 883 (C. C. A. 8); and *National Labor Relations Board* v. *Continental Oil Company*, 121 F. (2d) 120 (C. C. A. 10).

the Board's finding of domination, interference with, and support of the I. O. E. (Pet. 3). Petitioner (Pet. 3, note 4) expressly disclaims presentation of this second question for the purpose of procuring "a reversal of the decree below to the extent that it enforces the disestablishment requirement of the Board's order".

We are uncertain concerning the precise import of the second question thus presented by petitioner; since the reimbursement order, as the Board pointed out (S. R. 55, n. 46), depends upon the particular circumstances of this case, in that sense all the findings are pertinent to a resolution of the first question and petitioner's disclaimer becomes meaningless. Indeed, petitioner fails to specify the breadth of the question which it presents for review, but rather contents itself with the statement (Pet. 3) that the question of adequacy of the evidence should be reviewed only "To the extent, if any, that may be pertinent to a review" of the dues reimbursement question.

In any event, petitioner has not pointed out any respect in which the board's findings are not supported by substantial evidence. As appears from the Statement (*supra,* pp. 3–5), the findings are adequately bottomed upon the evidence. We therefore submit that the sufficiency of the evidence presents no question meriting further review, and that, accordingly, the writ, if granted, be limited to the first question presented.

CONCLUSION

For the foregoing reasons we do not oppose the granting of the petition for a writ of certiorari but suggest that the writ, if it be granted, should be limited to the first question presented in the petition, whether upon the findings, the Board could properly require the dues reimbursement.

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National Labor Relations Board.

MARCH, 1943.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*):

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

* * * * *

SEC. 10.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that

any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 709

VIRGINIA ELECTRIC AND POWER COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinions of the court below (S. R. 62–78)[1] are reported in 132 F. (2d) 390. The findings of fact, conclusions of law, and order of the Board (S. R. 13–62) are reported in 44 N. L. R. B. 404.

[1] Throughout this brief we have followed the same method of referring to the record as is used by the Company in its brief. "R" refers to the printed transcript of record heretofore filed in this Court, when this case was previously before the Court, October Term, 1941, Nos. 25 and 26; "S. R." refers to the printed transcript of record filed in this Court containing the principal proceedings had subsequent to the filing of the transcript of record in this Court in the earlier proceeding.

JURISDICTION

The decree of the court below was entered on December 9, 1942 (S. R. 78–79). The petition for a writ of certiorari was filed on February 4, 1943, and was granted on March 15, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. The Board found that the petitioner dominated, interfered with, and supported a labor organization of its employees, entered into an agreement with that organization providing for a closed-shop and check-off of dues for the purpose of securing that organization's financial stability, and coerced its employees to authorize the check-off by making it a condition to retaining their jobs, thereby committing unfair labor practices in violation of Section 8 (1) and (2) of the Act. The question is whether in these circumstances the Board properly required the petitioner to reimburse its employees for the sums of money which the petitioner deducted from their wages and paid over to the dominated labor organization as their dues.

2. Whether there is substantial evidence to support the Board's findings of fact that petitioner dominated, interfered with, and supported a labor organization of its employees. This question is

presented only to the extent, if any, that may be pertinent to examination of the first question.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 45–46.

STATEMENT

On February 27, 1940, the Board, after the usual proceedings, issued an order against the Virginia Electric and Power Company, herein called the Company (R. 952–980). Upon petitions by the Company and by The Independent Organization of Employees of the Virginia Electric and Power Company, herein called the I. O. E., to review and set aside the Board's order, the court below, in an opinion issued on November 12, 1940 (115 F. (2d) 414), set aside and refused to enforce the order (R. 1005–1019). Thereafter, this Court granted writs of certiorari and in an opinion issued on December 22, 1941 (314 U. S. 469), reversed the decision of the court below and directed that the cause be remanded to the Board for a redetermination of the issues in accordance with the opinion of this Court (S. R. 1–10). Upon the remand of the case, a wholly reconstituted Board reconsidered the entire case upon the original record and on September 24, 1942, issued a new decision (44 N. L. R. B. 404) containing its findings of fact, conclusions of law, and order (S. R. 13–62).

Petitioner has attacked the Board's findings that it dominated and interfered with the formation of the I. O. E. only to the extent that such findings are pertinent to the portion of its order requiring the reimbursement of the dues checked off by petitioner for the I. O. E.[2] The basis for the order of reimbursement, however, lies in petitioner's entire course of conduct resulting in the establishment and recognition of the I. O. E. by the Company. Indeed, the Board expressly predicated the provision in its order for repayment of the checked off dues upon "the particular circumstances of this case" (S. R. 54–55). Thus, all of the findings and evidence which relate to the Company's interference with the employees' choice of representatives and its support of the I. O. E. provides the background upon which the Board based its order of reimbursement. This evidence is summarized in this Statement; the evidence bearing directly upon the effect of the check-off provision is treated in the Argument, *infra*, pp. 26–29.

The facts as found by the Board and shown by the evidence may be summarized as follows:[3]

The Company's hostility to self-organization.—From 1922, when the Norfolk, Richmond and

[2] The Company has complied with the other portions of the Board's order. See p. 19, *infra*, and petitioner's brief, p. 10, and S. R. Vol. 2 (unprinted) pp. 53–62.

[3] In the following discussion the citations preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

Portsmouth street car operators lost a strike for the renewal of a preexisting contract with the Company, until 1937 the Company's employees remained totally unorganized (S. R. 22; R. 34–35, 78, 198, 328–331).[4] Following the enactment of the N. I. R. A. in 1933,[5] the Company issued a statement announcing that the Company's "past policy" of regarding collective bargaining as "entirely unnecessary" was still operative (S. R. 22–23; R. 427, 886),[6] and hired a labor spy through the Railway Audit and Inspection Company. to keep Superintendent Bishop of the transportation department at Norfolk informed of any union activity among the Company's employees (S. R. 23, 36; R. 56–59, 331–333, 370, 198–201). The employment of this labor spy continued for 2 years after the adoption of the Wagner Act (S. R. 23, 36, 41–42; R. 56–59, 331–

[4] The record shows that the Company's treatment of the strikers in 1922 was cited to the employees in 1937 to convince them that they should go along with the Company's wishes and join the I. O. E. rather than risk such losses as befell those who incurred the Company's wrath by joining an outside union (R. 78, 198; cf. R. 64, 82–83, 93, 160, 172, 185–186). Vice-President Jones himself admitted at the hearing that the Company's history of anti-unionism had been so strong that there were probably employees "afraid to join" a union (R. 347–348).

[5] Section 7 (a) of the National Industrial Recovery Act, 48 Stat. 195, assured employees the right to organize.

[6] Holtzclaw, the Company's president, testified at the hearing in this case that "there never was any modification made" in this policy (R. 428).

333, 370, 198–201).[7] In 1936, upon learning that employees were showing an interest in unions, Superintendent Bishop undertook to supplement the information furnished by his undercover operative, by himself calling various of the employees to his office and questioning them concerning their knowledge of and participation in labor activities (S. R. 23–24, 36; R. 93, 400, 820–821).

Formation of the I. O. E.—The A. F. of L. initiated efforts to organize the Company's employees in March 1937 (S. R. 24; R. 428–429).[8] The C. I. O.

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[7] The Company's use of espionage was brought home to the employees by statements of supervisors. Thus when Dispatcher Caton, a supervisory employee under Superintendent Bishop, greeted the appearance of Bolton in his office with "Here comes another C. I. O. man. He won't be here long," Bolton, who had joined the union, fearful of his job, denied his membership. Thereupon Dispatcher Caton replied, "Oh, yes, you are. I have a list of the names" (R. 160). Superintendent Bishop's son Warren, in the spring of 1937 boasted to one of the employees, Reutt, "that the Company had one of the smartest labor spies of any time" (R. 76). The labor spy posed as an energetic advocate of unionism, on one occasion openly supporting a strike at a Norfolk garment factory, addressing the strikers over a loud-speaker system. He was accepted by union officials and members alike as a sympathizer with organized labor when he attended meetings of the Norfolk Central Labor Union (S. R. 23; R. 198–201, 399–400). As the Board pointed out in its decision, this operative followed "the typical technique of the labor spy" (S. R. 23).

[8] At the opening of its drive, the A. F. of L. organizer telephoned a company superintendent, Davis, to ask for an appointment to discuss organization of a group of Norfolk employees; Davis informed his superiors of the call and

commenced organizing activities about the middle of April 1937 just after the Supreme Court sustained the constitutionality of the Act (S. R. 25–26; R. 62). The Company on April 26 posted a bulletin throughout its operations in which lip-service was paid to the right of self-organization, with emphasis placed however on the negative aspects of the Act and the "strikes and unrest" which flowed from a union organization, and an appeal made to the employees "individually or as a group" "to deal directly with the Company" as "in the past" rather than through representatives, as contemplated by the Act (S. R. 24–25, 37; R. 34–35). During the days following the posting of the bulletin Superintendent Bishop called various employees to his office, told them the Company had "money put away for the purpose of fighting the unions" and urged formation of a company union (S. R. 25, 38, n. 26; R. 63–64, 83–84, 105, 162, 168, 403–404). In view of the Company's whole course of conduct the bulletin was clearly coercive (S. R. 42–43).[8]

President Holtzclaw immediately issued instructions that no organizing activities could be carried on on Company time and property (R. 350, 428–429). An A. F. of L. representative distributed leaflets among the Richmond employees about this same time (R. 793–794).

[8] See for example, the testimony of Smith that the impression the bulletin made on him was that "I didn't feel that the company wanted us to have an outside organization" (R. 168). Other employees expressed their fear of Company reprisal if they joined an outside union (R. 64, 82–83, 160, 172, 185–186, 492).

Superintendent Bishop during the first part of May 1937 undertook to set up a company union at Norfolk. He directed employee Reutt to arrange meetings of employees on company time and property to form an inside union (S. R. 25–26; R. 64–68, 84, 403),[10] argued the merits of such a proposal to employee Smith (R. 162, 168), made a speech at the first of the meetings arranged at his direction (S. R. 26; R. 475), provided Elliott, the chairman selected at the meetings, with a copy of the company union plan in effect at the Colorado Fuel and Iron Company for his guidance (S. R. 35; R. 105–106, cf. 80–81), promised Elliott a good job with the Company if he would "swing the men into the company union" (S. R. 35; R. 104, 78, 74–75) and repeatedly met with a committee elected at the meetings and directed their activities for furthering a company union (S. R. 34; R. 68–69, 71, 81, 97–98).

On May 24, 1937, pursuant to a scheme worked out in advance the Company gathered employee representatives from each of its departments in Richmond and Norfolk to hear a prepared speech

[10] Reutt, aware of the Company's hostility to collective activity, was at first afraid to acquiesce in Superintendent Bishop's suggestion for fear his union sympathies were being tested and he would be fired if he even agreed to start this sort of a union (R. 64). However, Superintendent Bishop persuaded Reutt the Company really wanted a company union and thereafter Reutt sought to achieve Company favor by working arduously at promoting the I. O. E. (R. 64–67, 76–78, 81).

delivered in the first city by President Holtzclaw and in the latter city by Vice-President Throckmorton (S. R. 26–27, 37–38; R. 37–40, 169, 252–253, 317–318, 376–377, 660, 790, 822–823, 914–915).[11] The speech, although couched in careful language, in effect urged employees to form a company-wide union unaffiliated with any national organization (S. R. 27–28, 38–39, 44–46; R. 822–823).[12] At Richmond President Holtzclaw added at the conclusion of his set speech that any wage increase granted by the Company would be retroactive to June 1, 1937, a suggestion nicely calculated to spur the employees to zealously carry out the Company's proposal (S. R. 28, 39; R. 53, 435,

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[11] Superintendent Bishop told Reutt, Elliott, and other members of the committee with which he had been working at Norfolk of the fact Holtzclaw would speak at Richmond and they attended (R. 69, 98). The other representatives attending the meetings were elected at meetings held on company time and property and convened for this purpose by the Company's supervisory force at President Holtzclaw's directions (S. R. 26–27; R. 781, 739–740, 553–555, 169). Thus, the line foremen at Norfolk were all instructed to have their men attend a meeting in the company building during working hours (R. 168–169). Superintendent Hollik addressed the meeting, stating that he could not see "why it would be necessary to join any outside organization," that the men "could accomplish just as much among themselves" (R. 184–185, 189). He then left the men to elect their representative to hear the president's speech (R. 185).

[12] President Holtzclaw himself testified at the hearing that the purpose of the speech was to induce employees to form an organization (R. 50–51). Various employees who attended the meetings at which the speech was delivered testified that the employees understood the speech to mean that

454–455).[13] As the Company officials left these meetings, in accordance with arrangements made beforehand, they announced that the representatives might remain for further discussion of the matters broached, thus providing an obvious invitation for immediate action along the lines laid down by the Company (S. R. 28, 39; R. 45, 385, 455, 586).[14] The Richmond representatives, after electing a temporary chairman to "push this thing into an organization," decided to inform their constituents as to what had occurred at the meeting and to report back their reactions at a meeting of the representatives to be held on June 1 (S. R. 29; R. 100, 740–741, 790–791, 928). The Norfolk representatives decided to ascertain the reaction of their

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they "had" to form a company union, as the Company was opposed to the C. I. O. and A. F. of L. (R. 70–71, 86, 89, 98–100, 138, 492).

[13] Employees who heard the speech understood the sense of Holtzclaw's reference to the wage increase to be that as soon as they got a company union going they would get the increase (R. 70, 71, 89, 100, 138–139).

[14] The effectiveness of this strategy is shown by the fact that the employees attending the May 24 meetings assumed a large part of the work of organizing the I. O. E., although prior to May 24 they had not, for the most part, even considered the necessity of forming a labor organization (S. R. 46, n. 40; R. 638, 727, 715, 736–737, 770). Not only did these employees constitute a large majority of the original steering committees (R. 758, 914–915, 98, 710–711, 928), but 8 of 10 members of the general committee, the governing body of the I. O. E. (R. 580), were employees who attended the May 24 meetings (R. 920, 923), as were 18 of the 27 representatives elected by the various voting sections of the I. O. E. (S. R. 46, n. 40; R. 920–921, 925).

constituents to the message and to bring written authorizations from them to a meeting on June 1 (S. R. 29; R. 667, 678).

During the week following May 24, meetings of employees were held in almost every department. These meetings took place on company property and, to a large extent, on company time (S. R. 29; R. 808, 587, 736, 742–743, 782, 795–798).[15] The Company's supervisors actively cooperated. Superintendent of Distribution Crafton arranged to have the Norfolk linemen brought in without working overtime so that they could hear the report from their representatives (S. R. 29; R. 676). Superintendent Davis, of the Reeves Avenue plant in Norfolk, gave permission for the use of the company auditorium on May 27 (S. R. 29; R. 727–728). Superintendent of Installation Walke in Richmond permitted the use of the Service Building for meetings of the line department and the engineering group during working hours, and held the linemen in the office so that they could attend (S. R. 29; R. 742–743, 791, 797–798). At each meeting, after the Company's message had been reported to the men,[16] they im-

[15] During this week Superintendent Bishop called the representatives of the Norfolk transportation group to his office and explained what advantages would accrue if each employee would contribute a small monthly amount so they could hire their own lawyer and have their own union (S. R. 34; R. 71, 101–106, 96–97, 162).

[16] At the meeting of Norfolk linemen, Brown, who had been elected as their representative to attend the May 24

mediately voted to form an unaffiliated union and elected as representatives to bring about its formation (S. R. 29; R. 308, 587–588, 665, 696, 727, 743–744, 754, 761–762, 782–783), the same representatives for the most part whom they had previously selected at the Company's request to hear the May 24 message (S. R. 53; R. 109–110).[17]

During the first half of June the representatives chosen to form the inside union held numerous meetings on company property (S. R. 29–30; R. 110–112, 679–680, 697–698, 718, 754–755, 839–842, 889–890, 927–934). They employed an attorney to draft a constitution and by-laws for a system-wide organization (S. R. 29–30; R. 839–841, 679–680, 697–698, 715).[18]

On June 15 the Richmond and Norfolk steering committees, as well as representatives from other

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meeting, reported back that they were to form an independent union, that "the Company don't want you to join any outside affiliation. If you do you are liable to make the Company mad" (R. 172, 185–186).

[17] Fourteen of the 17 representatives who took part in the June 1 meeting at Richmond and 8 of the 9 Norfolk representatives at the first joint meeting on June 3 at Petersburg had been previously designated as representatives to hear the May 24 message (R. 914–915, 98, 929, 839). Superintendent Bishop was kept informed of the attendance of the Norfolk representatives, for their absence from the meeting scheduled for June 2 caused him to assure their presence at the June 3 meeting (R. 110, 839).

[18] The minutes of this meeting show that the proposal of one of the committeemen that they "procure counsel that is definitely partial to the general interests of labor" was overruled with the proposal "that emphasis be laid upon the standing of their lawyers as corporation lawyers, because of the importance of their ability in this respect to the continuation of our purposes" (R. 839–840).

cities in which the Company operates, met together and adopted the constitution and by-laws of the I. O. E. (S. R. 30; R. 844–855, 915–920, 688–689, 746–747). The constitution and by-laws make no provision for holding of meetings of members of the various voting sections (S. R. 31; R. 873).[19] They do contain a provision requiring all members to authorize the Company to deduct dues in the organization from their pay checks (S. R. 32; R. 855).

The I. O. E.'s whirlwind membership campaign; the execution of the closed-shop and check-off contract.—On June 18 application cards for membership in the I. O. E. were distributed throughout the Company's entire system (S. R. 31; R. 600, 683, 748–749); a number of them were signed on the Company's premises during working hours (S. R. 31; R. 77, 155–156, 173–175, 184, 193).[20] Within

[19] Subsequently the by-laws were amended by the General Committee to provide for *annual* meetings of the various voting sections (S. R. 31, n. 16; R. 898). With the exception of the Norfolk Distribution and Construction voting section, it does not appear that the various voting sections held regular meetings (R. 903–912). Significantly, it was in the Norfolk Distribution and Construction voting section that A. F. of L. members were concentrated, and it was at their insistence that regular meetings were held (R. 659–660).

[20] In one instance both Superintendents Hollik and Crafton participated in securing the signature to an I. O. E. card of an employee who had theretofore turned down several requests made by mere employees (R. 205–206, 209, 218). Employee Reutt, who had been urged by Superintendent Bishop to put the I. O. E. membership drive across in Norfolk, found employees "antagonistic" to him, as they con-

less than 2 weeks a majority of the Company's more than 3,000 widely scattered employees applied for membership in the I. O. E. (S. R. 31; R. 758, 778–779, 710). The Board found that the success of the membership drive was in large part due to the Company's sponsorship and assistance to the I. O. E. and its persistent and well-known opposition to national unions (S. R. 40–41).

Thereafter, the I. O. E. completed its organization by electing representatives to its permanent committees (S. R. 31; R. 893–898, 651–652, 805, 948–952). On July 30 the Company met with I. O. E. representatives for the purpose of negotiating a contract (S. R. 32; R. 874). The Company readily

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sidered it a "company union" and "detrimental" to them, and accused him of being a "company man" (R. 76–78, 81). He, thereafter, tried to see less of Superintendent Bishop but continued to solicit signatures for about a month, telling employees that the Company was going to sign a closed shop with the I. O. E. and they would be out if they did not join (R. 76–78). He believed that the Company would really fire those who did not join "voluntarily and quick" because he knew the I. O. E. was company favored and because Superintendent Bishop's son, Warren, had stated that those who were not in the company union would be fired as soon as it got fully organized (R. 76, 78). Underwood, one of the most active organizers of the I. O. E. at Richmond, sought to induce the Norfolk transportation group to join the movement for a company-wide unaffiliated organization with the argument that the employees could accomplish more with the Company with such an organization, that the Company would "absolutely refuse to deal with the C. I. O. or the American Federation of Labor; that the Company had a lot of money to fight such organizations, and that * * * the Company was going to be very favorable to his organization" (R. 75, 113–114, 819).

agreed to recognize the I. O. E., and granted the I. O. E. in the recognition clause the right to erect bulletin boards on company property (S. R. 32; R. 826, 875). The Company offered no objection to a check-off provision, providing for the deduction of I. O. E. dues from members' wages upon written orders signed by the members (S. R. 32; R. 299–300, 823, 876).[21] A closed-shop provision was discussed for "a good part of two hours" at the opening session; further discussion was postponed while the representatives of various departments split up and discussed with departmental officials of the Company matters pertaining to their departments (S. R. 32; R. 260, 345, 875–877). Discussion of the closed-shop issue was not resumed until the final session of the conference held the next day when, after 2 hours' further discussion, the closed-shop provision was agreed upon[22] (S. R. 32; R. 297, 303–304, 265). The

[21] Prior to meeting with the I. O. E. committee the Company had decided to grant the check-off (R. 299–300). While a proviso was added that an employee might revoke his authorization at any time (S. R. 32; R. 876, 300), the proviso was admittedly meaningless (R. 300), since the I. O. E.'s constitution and by-laws required its members to authorize the deduction of dues (*supra*, p. 13), and since the Company promptly thereafter entered into a closed-shop contract, requiring all employees to become members of the I. O. E. (R. 827–828, 878).

[22] During the bargaining negotiations some of the members of the I. O. E. committee expressed themselves as opposed to the closed shop (R. 297–298, 299). The closed-shop provision, which was to be effective in 90 days, provided that it should not affect the right of employees to join or remain members of other labor organizations (S. R. 32, n. 19; R. 878).

contract also provided wage increases costing the Company $600,000 annually, which were made retroactive to June 1, 1937, as President Holtzclaw, on May 24, had promised (S. R. 32–33; R. 265, 838). After ratification by the interdepartmental committees, the contract was formally executed on August 5, 1937 (S. R. 33; R. 878, 826–839). Two weeks later the Company anticipated the collection of I. O. E. dues by paying to the I. O. E. $3,784.50, although it had not at that time checked-off any sums from the employees' wages (S. R. 33; R. 860). On November 4, when the closed-shop provision went into effect, the Company discharged two employees, Staunton and Elliott, because they refused to become members of the I. O. E. (S. R. 33; R. 172–173, 181, 267–268.) [23]

The Company's concurrent discrimination against all other organizations.—Throughout the period in which the I. O. E. was being established the Company not only affirmatively supported it by the acts of assistance above described but also gave it substantial support by failing to accord equal facilities to and suppressing all efforts for the establishment of an A. F. of L. or C. I. O. union (S. R. 33–35, 47).

Although many of the meetings to form the I. O. E. were held on company property and solicitation of memberships took place on company time and property, the A. F. of L. organizer

[23] The Board found that these discharges violated Section 8 (3) and (1) of the Act (S. R. 50–51).

was expressly barred from use of these facilities by specific instructions issued by President Holtzclaw, n. 8, p. 6, *supra*). In June 1937, C. I. O. meetings were held under surveillance by Edwards, a supervisor under Superintendent Bishop in the Norfolk transportation department (S. R. 33; R. 119–120, 233–234, 163–164). Edwards also warned employees that they would be discharged if they kept "messing with the C. I. O." (S. R. 33; R. 162, 89, 152) and otherwise harassed those suspected of union membership and activities (S. R. 33–34; R. 106, 148–149, 157–160).[24] Bishop himself, to pose an object lesson as to what would happen to employees who opposed the Company's plans, summarily discharged Mann, an employee who at the first of the meetings looking to the formation of an unaffiliated union had openly spoken against the Company's position, on the alleged ground that, in discussions with other employees, Mann had failed to refer to Bishop as "Mr." (S. R. 33, 40, 49–50; R. 140–141, 143–144, 154, 115, 128, 379). The discharge was timed for the eve of the crucial June 1 meetings at Norfolk and Richmond (S. R. 29; R. 928–931, 889) and was based on so patent a pretext that no employee could fail to understand the warning to all employees implicit therein (S. R. 33, 43, 49–50).[25]

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[24] General Foreman May expressed surprise to an employee that he had joined the A. F. of L., stating that he thought he needed his job (R. 204, 218).

[25] The Board found that the discharge of Mann violated Section 8 (3) of the Act (S. R. 49–50).

Upon the basis of these findings and the entire record in the proceeding the Board concluded that the Company had violated Section 8 (1), (2), and (3) of the Act (S. R. 35–36, 48). The Board's order required the Company to cease and desist from the unfair labor practices found and from giving effect to its contract with the I. O. E. (S. R. 59–60). In addition the Board's order affirmatively directed the Company to withdraw all recognition from and completely disestablish the I. O. E. as a representative of its employees, to reinstate, with back pay two[26] of the three employees found to have been discriminated against,[27] to reimburse its employees in the amount of dues checked off their wages on behalf of the I. O. E. and to post appropriate notices (S. R. 59–62).

The Company and the I. O. E. again petitioned the court below to review and set aside the Board's order (S. R. 62–63). The court on December 9, 1942, rendered an opinion and entered a decree enforcing the Board's order in full (S. R.

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[26] For reasons set forth in its decision (S. R. 57–58) the Board found that it would not effectuate the policies of the Act to order the reinstatement of or award of back pay to one of the employees found to have been illegally discriminated against.

[27] In this respect the Board's order differed from that originally entered. The Board's first order required the reinstatement with back pay of four employees, Mann, Elliott, Staunton, and Harrell (R. 979–980). The order entered after this Court's decision required reinstatement with back pay only of Mann and Staunton (S. R. 61).

62–79). Judge Soper dissented with respect to enforcement of that portion of the Board's order requiring the Company to reimburse its employees for dues checked off to the I. O. E. (S. R. 76–78).

After the decision below, the Board, on December 14, 1942, ordered elections to be held among the company's transportation employees. On December 18 the company withdrew its recognition of and thereby disestablished the I. O. E. as the representative of its employees generally (Pet. Br. p. 10). At a series of elections held subsequently among the transportation employees 1,112 votes were cast in favor of Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, American Federation of Labor, and 159 against (Case No. R–4571, certification issued January 13, 1943; Case Nos. V–R–1181 and V–R–1184, reports issued February 9, 1943).

SUMMARY OF ARGUMENT

The Board's findings that the check-off constituted an illegal deduction from the employees' wages to be used for an illegal purpose are fully supported by the evidence. The I. O. E. was a company-dominated union. The campaign for its membership was conducted under circumstances of Company hostility to affiliated unions and advocacy of the I. O. E. The employees knew that the Company was being kept informed of who signed the check-off. With the signing of

the closed shop, the employees could only avoid the deduction from their wages by giving up their jobs. The deduction was, therefore, a price coerced from the employees and used to spare the Company the cost of financing its illegally created labor organization.

In these circumstances an order requiring the Company to reimburse its employees for the amounts deducted effectuates the policy of the Act. Such an order serves to make the employees whole and to remove the consequences of the employer's law violation. The remedy is no different in purpose or effect from the award of back pay to wrongfully discharged or wrongfully demoted employees. The requirement that the employer pay employees the full wages earned without benefiting by deductions made for the purpose of supporting an organization which he has sponsored is necessary to assure employees' freedom for self-organization. If employees are assured that they will not be saddled with the cost of supporting the organization of the employer's selection, they will feel much more free to contribute to the support of a labor organization of their own choice.

ARGUMENT

THE BOARD LAWFULLY ORDERED THE COMPANY TO PAY TO THE EMPLOYEES THE WAGES WRONGFULLY DIVERTED TO THE I. O. E. AS DUES

The facts found by the Board and shown by the evidence, as set forth in the Statement (pp. 3–19,

supra), fully warrant its determination that the Company dominated and interfered with the formation and administration of the I. O. E. and contributed support to it in violation of Section 8 (2) of the Act (S. R. 35–36, 48). The second decision of the Board, following the directions of this Court, based its findings and conclusions respecting the I. O. E. upon an appraisal of all the facts disclosed by the record. The argument here made, that the second decision of the Board contains the same defects found by this Court in its first decision (Pet. Br. pp. 3–9, 36–37), was rejected by the court below (S. R. 67) and is clearly untenable, as the slightest comparison of the new decision (S. R. 14–62) with the old (R. 952–980) shows. Although contesting the legality of the findings respecting domination in so far as pertinent to the reimbursement of union dues, petitioner has failed to refer to any specific finding which it claims to be unsupported. We shall take it as established, therefore, that the Board properly held the I. O. E. to be an organization established and maintained in violation of Section 8 (2).[28]

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[28] *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 262; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 599–600; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 275; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 460–461; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 521–523; *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, 312 U. S. 660, affirming 112 F. (2d) 657, 659–660 (C. C. A. 2).

Nor is there basis for the Company's contention that the court below failed to pass on the substantiality of the evidence to support the Board's findings (Pet. Br. 4). While the court below was of the view that under the doctrine of the "law of the case" it was precluded by this Court's reversal of its earlier decision from holding the evidence insufficient, it did, nevertheless, pass an independent judgment thereon "as an additional ground of decision" and declared that in the light of the opinion of this Court, it would not be "justified in holding it [the evidence] insufficient" (R. 70–71).

The question in this case is whether the Board properly ordered the reimbursement of dues checked off by the union which was established at the instance of the company. This depends upon whether there is basis for the Board's finding (S. R. 55) that such an order is necessary to effectuate the policies and purposes of the Act and to fully remedy the effects of the unfair labor practice.

In evaluating the Board's judgment in this respect the significance of the check-off as a method of interference by the company with its employees' freedom of choice of representative must be understood. A provision that an employer deduct from the wages of his employees the dues of a company-dominated organization is not to be treated as a

minor matter ancillary to the employer's unfair labor practice. The check-off provides an employer who is seeking to force a particular representative upon his employees with a powerful weapon, one which, though innocuous on its face, is likely without more to maintain in existence an organization which has been unlawfully established.

This result does not follow merely from the fact that the check-off secures the financial stability of the organization without direct contributions by the employer. Even more important is the fact that the check-off cannot operate without giving the employer a means of ascertaining the identity of those employees who are, and who are not, members of the favored union. Even where the check-off is not compulsory (as it is here), an employee who knows that his employer favors a particular organization will be under pressure to see that his name is on the approved list.

The use of the check-off as a device for compelling employees to support and maintain company-controlled labor organizations became so widespread in the railroad industry before 1934 that the amendments to the Railway Labor Act adopted in that year expressly made it unlawful for a carrier "to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations" (Section 2, Fourth,

48 Stat. 1185, 45 U. S. C., Section 152, Fourth).[29] In sustaining the validity of this provision in *Brotherhood of Railroad Shop Crafts* v. *Lowden*, 86 F. (2d) 458 (C. C. A. 10), certiorari denied, 300 U. S. 659, the court described the coercive effect of the check-off as follows (p. 461):

> * * * The deduction of dues payable to an organization from the wages of employees discloses to the carrier the affiliation of employees with unions. It discloses which of them belong to a particular union. * * * Furthermore, it proffers an opportunity for the carrier to take into consideration the status of employees in respect to unions in connection with matters of promotion, discipline or dismissal. It is

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[29] The hearings and debates on both bills make it clear that the evil against which the prohibition was directed was the use of the check-off by the railroads as a means of coercing employees to support and to pay the cost of maintaining company unions instituted by the railroads to defeat genuine self-organization. See Senate Hearings on S. 3266 to amend the Railway Labor Act, Committee on Interstate Commerce, 73d Cong., 2d Sess., pp. 23, 165; 78 Cong. Rec. 11718, 12390, 12553. This provision was explained to the Senate Committee on Interstate Commerce (Hearings on S. 3266, 73d Cong., 2d sess.), by Federal Coordinator of Transportation Eastman. He said, p. 23:

"The reason is that a railroad is thus given information as to whether or not employees are paying dues in an association. It is very easy for the railroad to create the impression, or for the employees to get it in some other way, that the fact they do or do not pay dues will have some influence upon their record with the railroad company. * * *"

A somewhat fuller explanation of the effect of the check-

> readily conceivable that, moved by a desire to avoid the displeasure of the carrier with the possible loss of employment, employees may be influenced to join a particular union or dissuaded from withdrawing membership. * * *

In the same case the District Court had referred to the pay-roll deduction plan as "a subtle and insidious method of exercising influence over working men in order to insure their continued membership in company unions, even though they were not 'sold' with the virtues of such unions." *Association of Rock Island, etc. Employees* v. *Lowden*, 15 F. Supp. 176, 184 (D. Kans.).

Although the National Labor Relations Act does not go so far as to prohibit the check-off, it plainly

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off was made by George M. Harrison, on behalf of the Railway Labor Executives' Association. He stated (*id.* at p. 165):

"* * * The check-off system, instituted by many carriers, has only been an astute method of continuing company control of union finances while compelling the employees to pay the bill. The history of the 'voluntary' check-off system shows incontestably that the employees have been coerced into meeting the cost of company unions, controlled by the managements for the purpose of defeating the legitimate needs of railway workers. Union dues collecting by the railway managements not only surrenders union pursestrings into management hands, but it also gives to the management a list of employees who are supporting the personnel policy of the railroad. It would be a brave or foolhardy employee who refused to sign a check-off slip under such conditions, without protection by law or by a genuine labor organization."

empowers the Board to find that the deduction of dues by the employer on behalf of a company-dominated organization is unlawful. The circuit court of appeals held that in the circumstances of the present case, "the check-off was unquestionably an unfair labor practice" (S. R. 71).

The facts fully support this conclusion. From the outset of the campaign to enroll employees in the I. O. E., the membership blanks used contained a provision authorizing the check-off of dues and also a provision to be signed by the Company in acknowledging receipt of the notice of the check-off (R. 173, 843). Thus, the employees were informed the moment they were presented with a card for their signature that the Company would know whether they signed it or not. Furthermore, the attorney who drafted the membership blanks explained, when he proposed this form of membership card to the steering committee which was organizing the I. O. E., that the cards were to be executed in duplicate and one copy turned over to the Company (R. 919–920). So not only from the face of the card but also from the directions for its signature given by the solicitor would the employee be cautioned that the Company would know just where he stood. Nor would the Company be unaware of the significance of its failure to receive an authorization for the deduction of dues from any particular employee. The constitution and by-laws of the I. O. E. made authorization of the

check-off a requisite to membership in the organization (S. R. 55; R. 855). They expressly provided that each member "shall direct the proper disbursing officer of the Company to deduct the amount of such member's dues from his wages, and pay the same to the I. O. E." and that "any member failing to pay the dues as required" would forfeit his membership (*ibid.*). It would thus be apparent to the Company that any employee whose dues were not checked off was not a member of the I. O. E.

The Board found that the success of the membership campaign which resulted in securing the signature of a majority of the Company's more than 3,000 widely scattered employees within 2 weeks of the date the cards were distributed was largely the result of the Company's "sponsorship and assistance to the I. O. E. and its persistent and well-known opposition to national unions" (S. R. 40–41, 48). This finding is fully supported by the evidence. See pp. 4–14 *supra*. Even Company witness Davenport admitted at the hearing that he joined the I. O. E. because he knew the Company wanted it and he wanted to keep his job (R. 492). Employee Reutt, who was soliciting at the behest of Superintendent Bishop, testified he encountered "hostility" because the men accused him of being a "company man," the I. O. E. of being a "company union" and "detrimental" and in order to get signatures had to re-

mind the men of the Company's opposition to unions and the risk of losing their jobs if they did not join "voluntary and quick" (R. 76–78, 81). Rumors of an impending closed-shop with the I. O. E. were used to hasten the gathering of signatures (R. 78). The drive to get the cards signed took place extensively on Company property (S. R. 55; R. 205–206, 208–209), often on Company time (S. R. 55; R. 77, 155–156, 173–175, 184, 193).

After a majority of the employees had signed the combination membership and check-off card, the Company entered into the closed-shop contract theretofore predicted (R. 874–878).[20] The contract was executed on August 5, 1937 (R. 878) and on August 20, 1937, the Company paid the I. O. E. $3,784.50 as dues, pursuant to the check-off provisions of the contract, although it had not yet made the deduction from the wages of its employees (S. R. 33; R. 779–780, 860). On November 4, 1937, when the closed-shop provision went

[20] According to the National Industrial Conference Board, "There is no questioning the fact that an overwhelming majority of executives who determine the policies of their companies are strongly opposed to the closed-shop principle." National Industrial Conference Board, Studies in Personnel Policy, No. 12, *The Closed Shop* (March 1939), p. 11. "The average employer's opposition to the check-off is even more intense than to the closed shop." Robert R. R. Brooks, *When Labor Organizes* (1937), pp. 18–19. Nevertheless a closed shop is often the last step in the familiar company union pattern. Joseph Rosenfarb, *The National Labor Policy* (1940), pp. 256–257. "After the company union has been erected, the second problem is to keep it under control. * * * When

into effect, the Company discharged the only two employees who refused to join the I. O. E. and authorize the check-off (S. R. 33, 51; R. 172–173, 181, 267–268, 858–859). It is apparent from these facts that we do not have a system such as is discussed in petitioner's brief (pp. 25–27), whereby the employer merely deducts union dues from the wages of those employees who voluntarily authorize him to do so, although that in and of itself might affect the employees' freedom of choice, since it would enable the employer to know who belonged to the favored organization (see pp. 23–25, *supra*). Here we have the check-off combined with a closed shop,[31] and with a provision in the by-laws of the I. O. E., making the check-off compulsory upon all members. Under the closed shop, no man could work for the Company without

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membership dues are collected from the workers, control may be maintained by subtracting the dues from the pay envelopes." Robert R. R. Brooks, *op. cit.*, pp. 92–93. Cf. United States Department of Labor, Bureau of Labor Statistics Bull. No. 634, *Characteristics of Company Unions*, 1935 (U. S. Gov't Printing Off., 1938), p. 116. "In our survey of railroad company unions we have noted the frequent use of the check-off to collect company-union dues. While objecting to this method when it is used in a contract between a trade union and an employer, those open-shop corporations have nothing to say against it when it meets their own purposes. They quickly forget their open-shop principles." Dunn, Robert W., *Company Unions* (1927), p. 170.

[31] The Board held this contract invalid under Section 8 (3), which proscribes a closed-shop agreement with an organization established with the assistance of the employer (S. R. 48, 51, 54, 55).

belonging to the I. O. E. No person could belong to the I. O. E. without authorizing the Company to deduct his dues from his wages. Obviously, an employee's only alternative to accepting the check-off was to abandon his job.[32] The employer's use of any such device as a means of supporting a labor organization established at the instance of the employer is plainly a violation of the Act.

These provisions of the contract remained in full force and effect when the court below upheld the Board's finding that the contract was illegal and entered a decree enforcing the Board's order requiring the Company to cease giving effect to it (S. R. 54, 60, 76, 78–79; see Certified Supplemental Record, Vol. II, p. 13, at pp. 6 and 14). From November 4, 1937 until December 9, 1942, each employee who has worked for the Company[33] received from the Company less than the full amount of wages he earned.[34] The Board found

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[32] The Company's vice president admitted that the provision of the contract permitting employees to revoke the assignment of wages to the I. O. E. was meaningless: "If they had been revoked, of course, the employee has automatically ceased to be an employee" 90 days thereafter (R. 300).

[33] While the first deduction was made on August 20, 1937, it covered only the 2,523 employees who had by that date signed check-off authorizations (R. 860). By November 4, 1937, every employee had to sign such an authorization or leave the Company's employ (R. 172–173, 181, 267–268, 858–859).

[34] The dues were deducted semiannually in advance (R. 779–780, 860). Originally they were $3 a year, but in March 1938 they were increased to $6 a year (R. 576).

that the monies thus deducted from the wages of the employees constituted the price of retaining their jobs, a price coerced from them for [the Company's] purpose of supporting and maintaining the organization which [the Company] had dominated in order to thwart *bona fide* representation" and "that, as a result of the imposition of the illegal closed-shop and check-off requirements, the employees suffered a definite loss and deprivation of wages equal to the amounts deducted from their wages and paid over to the I. O. E." (S. R. 55). If any authorization by an employee to an employer to deduct sums from his wages and pay them over to a company-sponsored union could ever be voluntary, the authorizations in the instant case clearly were both involuntary in their inception and involuntary in their continuance without revocation. At no time were the employees free to refuse to enter into the authorization or to withdraw therefrom.

It is thus clear that the sums checked off the employees' wages, instead of being voluntary contributions, constituted forced tributes levied upon the employees for the maintenance and support of the very instrument by which the Company foreclosed any genuine exercise of the rights of self-organization and collective bargaining. Without the semblance of choice on their part, the employees were compelled to forego a portion of their earned wages and to allow the Company to withhold it and turn it over to the organization

which the Company itself had caused to be created to serve its own ends. As the Board found, it was an exaction enforced by illegal means and used for an illegal purpose (S. R. 55).[35]

In these circumstances it was appropriate for the Board affirmatively to order that amounts unlawfully deducted from the employees' wages be returned. This Court has held that (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236):

> The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. * * *

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[35] That "agreements" to permit employers to make deductions from wages for various purposes are often not truly voluntary on the part of employees is indicated by many state statutes which outlaw or regulate particular types of such deductions, or require wages to be paid in full in cash. United States Department of Labor, Bureau of Labor Statistics Bull. No. 229, *Wage-payment Legislation in the United States*, by Robert Gildersleeve Paterson, Govt. Print. Off., 1918, pp. 94–117, 128–131; Bureau of Labor Statistics Bull No. 408, *Laws Relating to Payment of Wages*, by Lindley D. Clark and Stanley J. Tracy, Govt. Print. Off., 1926, pp. 24–33; Carroll B. Daugherty; *Labor Problems in American Industry* (4th ed. 1938), p. 822; Don D. Lescohier and Elizabeth Brandeis, *History of Labor in the United States, 1896–1932*, pp. 673–675. These acts were held constitutional in *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *Baltimore, etc., R. Co.* v. *Hagan*, 183 Ind. 522, 109 N. E. 194.

And in *Republic Steel Corp.* v. *National Labor Relations Board,* 311 U. S. 5, 13, the Court held that, although the Board had no power generally to compensate third parties for losses sustained as a result of unfair labor practices, its functions were, *inter alia,* "to make good to the employees *what they had lost* through the discriminatory discharge." [Italics supplied.]

There can be no doubt that the order requiring the reimbursement of the dues illegally checked off is a remedial measure which serves to "make good to the employees what they had lost," or that it removes the "consequences of violation" of the Act. Petitioner's position seems to be, however, that the consequences are not of a kind which will thwart the purpose of the Act, and accordingly that the Board's order will not effectuate the Act's policies.

In this respect we think that an order requiring the payment of the amount checked off to a company-dominated organization as dues is indistinguishable from an order requiring the payment of other compensation which has been withheld as the result of an unfair labor practice.

It would seem to be axiomatic that the Board, upon finding that as part of an unfair labor practice an employer had wrongfully withheld portions of the wages earned by his employees, could properly require the employer to pay over to his

employees the wages earned but not paid.[36] The power of the Board to require an employer to pay wages to an employee who has never earned the wages where his inability to work resulted from the employer's unfair labor practice is established beyond question.[37] Similarly, the power of the Board to require an employer to pay wages to an employee at a higher rate than that which he has earned where the failure to accord a promotion to a better job or the demotion to a poorer job was caused by the employer's unfair labor practices has uniformly been upheld.[38] Where

[36] That the award to the employees of the sums deducted from their wages is to be treated as the payment of unpaid wages is indicated by the common law analysis of a similar situation. An Indiana statute made it unlawful for railroad companies to maintain relief associations to which employees were required to resort for benefits if they were injured. Suits for wages earned but not received were brought against railroads for the amounts which had been checked off as dues to such associations over a period of years. It was held that the written assignments authorizing the check-off were void and that the employees were entitled to recover the "balance of wages due." *Baltimore, etc., R. Co.* v. *Hagan*, 183 Ind. 522, 524, 109 N. E. 194; *Vandalia R. Co.* v. *Kelley*, 187 Ind. 323, 325, 119 N. E. 257; *Baltimore & O. S. W. R. Co.* v. *Poston*, 114 N. E. 981 (Ind. App.); *Acton* v. *Baltimore & O. S. W. R. Co.*, 59 Ind. App. 280, 108 N. E. 535; *Baltimore & O. S. W. R. Co.* v. *Miles*, 184 Ind. 719, 720, 112 N. E. 524.

[37] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48–49; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177.

[38] *National Labor Relations Board* v. *New Era Die Co.*, 118 F. (2d) 500, 506 (C. C. A. 3); *National Labor Relations Board* v. *American Potash and Chemical Corp.*, 98 F. (2d) 488, 491, 493–494 (C. C. A. 9), certiorari denied, 306 U. S. 643, enforcing 3 N. L. R. B. 140, 167; *National Labor Rela-*

wages have been withheld and turned over to a company-dominated labor organization the employee suffers two injuries in addition to those suffered when he is discriminatorily discharged: he expends his energy doing work for which he receives no recompense; as a result of the use to which the money withheld is put he is saddled with an agency he did not choose and which bars his bargaining through an agency of his own selection.

Thus, the return to an employee of wages earned by him from the Company, but never paid to him because under threat of loss of his job he assigned them to a company-dominated union, is in every respect the same kind of remedy, and just as necessary to an effectuation of the Act's purposes, as making whole an employee by awarding him back pay for a period of discriminatory lay-off or demotion. The withholding of a part of an employee's wages under such potent compulsion is as direct an injury as a loss of pay caused by a discriminatory discharge and calls as forcibly for an appropriate restorative.

The court below adopted the above analysis, stating (S. R. 72–73):

> An order requiring reimbursement of the check-off under such circumstances as exist

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tions Board v. *Acme-Evans Co.*, 130 F. (2d) 477 (C. C. A. 7), certiorari denied March 8, 1943, No. 681, this term, enforcing 24 N. L. R. B. 71, 119–120, 123. See also *Matter of National Motor Rebuilding Corp.*, 19 N. L. R. B. 503, at 520–521, 526–527.

> here * * * is closely analogous to orders directing the payment of back wages in case of discriminatory discharge. In the case of discriminatory discharge, the employee has lost wages as the result of an unfair labor practice, and the payment of back wages is ordered to wipe out so far as possible the effect of the practice and effectuate the purposes of the Act. Here, the employees have just as certainly lost the wages deducted under the check-off agreement, which because of the payment to a company-dominated union is also an unfair labor practice.

The Board properly found that ordering the employer to reimburse the employees for the dues deducted would tend to effectuate the policies of the Act. If an employee is compelled to pay dues to one labor organization, he is deterred from joining another; employees generally will not feel able to pay dues to two unions at the same time. Illustrative is the testimony of Bolton who explained the defection of members from the C. I. O. after the Company's signing of the closed-shop and check-off with the I. O. E., by saying, "You would have to be a millionaire to keep in all of them" (Tr. 875). While the C. I. O. gained a substantial number of members before the I. O. E. was recognized, after the closed-shop and check-off went into effect, despite the fact that the contract expressly permitted employees to belong to outside unions (R. 828) so long as they also maintained their mem-

bership in the I. O. E., the C. I. O. became dormant (R. 135, 246). The record strongly suggests that employees anxious to build an outside union might have been more successful, even while the I. O. E. was imposed upon them, if they had been able to assure their fellow employees that the Company would be forced to return the dues paid to the I. O. E. This knowledge would have made it more difficult for the employer to impose its untrammelled will on its employees, just as knowledge by employees that if a discriminatory discharge should befall them they will in time get back pay makes them bolder to exercise their rights of self-organization. Hence a compulsory check-off to a dominated organization in itself detracts from the employees' freedom to choose another as his representative. If the employee can count on repayment of the dues checked off,[39] he will unquestionably feel more free to join, or to continue his membership in, lawful labor organizations. Thus to require the reimbursement of dues illegally deducted effectuates the policy of the Act by "pro-

[39] It is argued by petitioner (pp. 18–19) that the employees cannot be rendered secure in this respect since, unless they had legal omniscience, they would not have known how this case would ultimately be decided. It is, of course, true that until the Board and the courts have established a body of precedents to that effect employees cannot count on reimbursement or any other kind of relief. This was just as true of the back pay requirement for discharged employees when it first came before this Court (*Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301

tecting the exercise by workers of the full freedom of association, self-organization, and designation of representatives of their own choosing." Section 1; see *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 362–363. Just as back pay to a wrongfully discharged or wrongfully demoted employee assures employees that they may assert their rights of self-organization without risking the loss of wages, so back pay to an employee who suffers a wrongful check-off assures employees that if they proceed to finance an organization of their own choice they will not be forced to bear the expense of supporting both their own organization and that forced upon them by the employer.

Furthermore, should it be held that the Board cannot order the repayment of funds unlawfully checked off, an employer could evade the prohibition against giving financial support to a union through employing the system of deducting dues from the employees' wages. Instead of paying the costs of a company union out of his own pocket, as em-

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U. S. 1) as it is today for the reimbursement of dues checked off. Since in those cases the employees had no assurance of getting back pay in advance of this Court's ruling, the possibility that they might receive it probably did not induce them to act more independently, and it could have been argued there, as it is here, that for this reason the primary effect of the order was to act as a deterrent for employers in other cases. But there must always be a first decision on a point, and the fact that this is the case which may establish the precedent on the present problem should not affect the outcome or prejudice the employees involved.

ployers formerly had done, he escapes this burden by foisting it on his employees through the check off.[40] If he had only a cease and desist order to fear, there would be nothing to discourage an employer from engaging in such tactics, and the employees would be worse off than they were before. Only if the employer can be forced to make the employees whole will the employees be safeguarded against the employer's use of such a plan. Certainly an order which deprives the employer of positive benefits which would otherwise accrue from a particular means of violating the Act must be regarded as a reasonable method of effectuating the statute's policy to assure the employees' freedom of self-organization. In this respect, as in the others referred to above, we think the parallelism between an order requiring a repayment of dues compulsorily checked off and a back pay order is very close.

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[40] Outside of the railroad industry, to which reference has heretofore been made (see pp. 23–25, *supra*), most company unions did not charge dues. Of the total of 592 company unions studied, 411, covering 411,053 workers, reported that they had no provision for dues or any other means of raising funds from the membership. United States Department of Labor, Bureau of Labor Statistics Bull. No. 634, *Characteristics of Company Unions* (1935), pp. 61–62, 116. "Among the company unions covered, the practice of charging dues was in the main a development of the N. R. A. period and was confined almost entirely to optional-membership company unions," *ibid.*, pp. 115–116. See also Carroll R. Daugherty, *Labor Problems in American Industry* (4th ed., 1938), p. 640. This fact doubtless explains why Congress in adopting the National Labor Relations Act was not con-

Petitioner attacks the Board's findings that the check-off resulted in a loss of wages to the employees. The claim is that the I. O. E. conferred benefits which more than offset the amount of the deductions. It does not follow, however, from the fact that wages were raised or working conditions improved after negotiations with a dominated organization that such benefits were attributable, even indirectly, to the expenditure of money which the employees were compelled to advance for the support of that organization. As the court below points out (S. R. 75)—

> the Act proceeds upon the theory that the maintenance of a company dominated union is not a benefit but a detriment to the employees who are members of it. And it is no answer to this to point to wage increases and other benefits secured as a result of contracts made by the company dominated union; for it is manifestly impossible to say that greater benefits might not have been secured if the freedom of choice of a bargaining agent had not been interfered with.

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fronted with the use of a check-off to maintain a company union, whereas just the year before this problem loomed so large in the adoption of the Railway Labor Act Amendments (see pp. 24–25, n. 29, *supra*). However, Board cases show that since 1937, employers have on a large scale resorted to the check-off to finance company-dominated unions. The cases which have come before the courts and which are collected in petitioner's brief, Appendix B, are but a small proportion of the cases in which the Board has encountered the use of a check-off for such purposes.

Indeed the establishment by employers of organizations of which they approve obviously stems from their belief that the employer will benefit if the employees have such representation. Thus in the famous *Texas & New Orleans R. Co.* case [1] the railroad company's efforts to substitute a dominated organization for the independent Brotherhood was motivated by the belief that a wage controversy with its employees could be settled at an increased cost of $75,000 per year instead of $340,000 (281 U. S., at 559). The circuit court of appeals in that case pointed out that "a probable consequence of employees being so represented would be their failure to fare as well financially as they would have fared if they had been represented by a loyal agency intent on promoting their interests" (33 F. (2d) 13, 17 (C. C. A. 5)).

It is, of course, unnecessary to prove in the particular case that the employees would have received greater benefits by bargaining through a representative entirely independent of the employer. The Committee Reports on the National Labor Relations Act find specifically that collective bargaining is "reduced to a mockery by the imposition of employer-controlled labor organizations" (H. Rep. No. 1147, 74th Cong., 1st sess., pp. 10–11; S. Rep. No. 573, 74th Cong., 1st sess., p.

[1] *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548.

17) and the Act itself, which outlaws such organizations as a medium for collective bargaining, may be regarded as a legislative finding that they are detrimental to employees.[42]

Even if it be assumed that the employees received some benefits from the dues paid to the I. O. E., the mere fact that an employer is required to pay more than the precise amount of the loss he occasions does not mean that the award to the employees is penal. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 583 (holding the double damage provision of the Fair Labor Standards Act to be remedial and not penal); *Robertson* v. *Argus Hosiery Mills, Inc.,* 121 F. (2d) 285, 286 (C. C. A. 6), certiorari denied, 314 U. S. 681; *Hargrave* v. *Mid-Continent Petroleum Corp.,* 36 F. Supp. 233, 235 (E. D. Okla.); *Lorenzetti* v. *American Trust Co.,* 45 F. Supp. 128, 139, 140 (N. D. Calif.); *Cox* v. *Lykes Brothers,* 237

[42] Authorities in the field of employer-employee relations have long agreed that a prerequisite of genuine collective bargaining is that the employees be represented by representatives who are truly independent of the employer and that company-supported unions are worthless to the employees insofar as *bona fide* collective bargaining is concerned. Carroll R. Daugherty, *Labor Problems in Modern Industry* (4th ed. 1938), p. 646; Gordon S. Watkins, *Labor Problems* (1935, Rev. ed.), pp. 639–640; Dale Yoder, *Labor Economics and Labor Problems* (2d ed., 1939), p. 607; Twentieth Century Fund, Inc., *Labor and Government* (1935), pp. 326, 327, 330; Robert R. R. Brooks, *When Labor Organizes* (1937), pp. 90–91; John R. Commons and John B. Andrews, *Principles of Labor Legislation* (1936, 4th rev. ed.), pp. 409–410; note, *Employer Interference with Lawful Union Activity,* 37 Col. Law Rev. 827–828.

N. Y. 376, 379, 143 N. E. 226; *Calvin* v. *Huntley*, 178 Mass. 29, 59 N. E. 435; cf. *Brady* v. *Daly*, 175 U. S. 148, 153–155; *Turner Lumber Co.* v. *C. M. & St. P. Ry.*, 271 U. S. 259, 262.[42]

After mature consideration of the problem the Board has concluded that, in appropriate circumstances, a dues reimbursement provision does effectuate the policies of the Act, and has directed such relief. Under the Act the particular means by which the effects of unfair labor practices are to be expunged is, as this Court has repeatedly recognized, a matter "for the Board, not the courts, to determine." *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271. The Board's determination is final unless arbitrary. It was not

[42] Cf. *Baltimore & O. S. W. R. Co.* v. Poston, 114 N. E. 981, Ind. App. [redacted], allowing recovery of the full amounts of wages checked off to an illegal relief association without any allowance of credit for the benefits actually paid by the relief association to the employee. Likewise, in *Kettering* v. *Imperial Coal Co.*, 32 Pitts. L. J. 359, an employee, who was paid in part in scrip issued in violation of a Pennsylvania statute requiring wages to be paid in money, was allowed recovery of the wages represented by the script without any set-off on account of the value of the goods he purchased at a company store with the scrip. Similarly, the statutes authorizing recovery by employees of amounts deducted by employers expressly provide that no set-offs or counterclaims are allowable. United States Department of Labor, Bureau of Labor Statistics Bull. No. 229, *Wage-payment Legislation in the United States*, Govt. Print. Off., 1918, pp. 129–131.

arbitrary here. In this case by the combination of the closed-shop and check-off arrangement, the employees were kept firmly bound to the dominated I. O. E. To say that the Board may not in these circumstances direct reimbursement of the employees for the dues which the company deducted from their wages and paid over to its nominee is to assert that an employer who chooses to establish and maintain an illegal labor organization as a means of forestalling genuine self-organization is free to foist the cost of maintenance upon the employees, without restoring to the victims the amounts used by the employer for this illegal purpose. The Act impels no such result.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be affirmed.

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APRIL 1943.

APPENDIX

National Labor Relations Act. (Act of July 5, 1935, Stat. 449, 29 U. S. C., Sec. 151, *et seq.*):

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or pre-

scribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

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(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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U. S. GOVERNMENT PRINTING OFFICE: 1943

SUPREME COURT OF THE UNITED STATES.

No. 709.—October Term, 1942.

Virginia Electric and Power Company, Petitioner, *vs.* National Labor Relations Board.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[June 7, 1943.]

Mr. Justice Murphy delivered the opinion of the Court.

After the remand of this case in 314 U. S. 469, the Board reconsidered it upon the original record, made new findings of fact, and concluded that the Company had violated § 8(1), (2) and (3) of the Act. 29 U. S. C. § 158. A new order was entered requiring the Company to cease and desist from the unfair labor practices found and from giving effect to its contract with the Independent Organization of Employees. The order also directed the Company to withdraw recognition from and disestablish the I. O. E. as a representative of its employees, to reinstate with back pay two of three employees found to have been discriminatorily discharged, to reimburse its employees in the amount of dues and assessments deducted from their wages by the Company and paid to the I. O. E., and to post appropriate notices. 44 N. L. R. B. 404. The court below, one judge dissenting in part, upheld the order in full. 132 F. 2d 390. The I. O. E. then apparently decided to dissolve, and the Company withdrew recognition from and disestablished it. Because of an apparent conflict of decisions, we granted the Company's petition for certiorari which challenged only the authority of the Board to require reimbursement of the checked-off dues, a point not reached when the case was here before.[1]

[1] In eleven cases five circuits, under varying circumstances and on diverse reasoning, have refused to enforce Board orders requiring reimbursement of checked-off dues. See Western Union Telegraph Co. *v.* National Labor Relations Board, 113 F. 2d 992 (C. C. A. 2); Corning Glass Works *v.* National Labor Relations Board, 118 F. 2d 625 (C. C. A. 2); National Labor Relations Board *v.* West Kentucky Coal Co., 116 F. 2d 816 (C. C. A. 6); National Labor Relations Board *v.* U. S. Truck Co., 124 F. 2d 887 (C. C. A. 6); National Labor Relations Board *v.* Gerity Whitaker Co., 10 L. R. R. 494 (C. C. A. 6); National Labor Relations Board *v.* J. Greenebaum Tanning Co., 110 F. 2d

The new findings are much more elaborate than those originally before us in 314 U. S. 469, and it would serve no useful purpose to discuss them minutely. The following outline is sufficient for an understanding of the issues raised: The findings sketch in considerable detail the anti-union background of the Company and the activities of Bishop, the superintendent of the Company's Norfolk transportation department, including his suggestions to employees Ruett and Elliott that they form unaffiliated organizations. The growth of the I. O. E. is traced from the speeches and meetings of May 24, 1937, which were held after requests for collective bargaining were received by the Company from several small groups of employees as a result of the bulletin of April 26, and which were attended by representatives selected by the employees at the suggestion of the Company. The tracing continues with a discussion of the reactions of those representatives after the Company officials left the meetings and their subsequent reports delivered to the employees on Company property and in some instances on Company time with the help of supervisory employees. Emphasis is placed upon the frequent meetings on Company property held by the resultant Norfolk and Richmond steering committees during the first part of June. The Constitution and by-laws of the I. O. E. were adopted on June 15. The membership campaign began June 17, and within two weeks the I. O. E. had a majority of the Company's 3000 widely scattered employees. The Board contrasted this with its findings that during the critical formative period of the I. O. E. the Company discharged one Mann, an outspoken foe of an "inside" union, that Edwards, a supervisor, kept C. I. O. meetings under surveillance and warned some employees against "messing with the C. I. O.", and that the Company denied the use of its premises to representatives of national labor organizations, and then drew the conclusion that the quick success of the I. O. E. membership campaign "must be attributed in large part to the respondent's [Company's] sponsorship of and assistance to the I. O. E. and its persistent and well-known opposition to national unions."

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984 (C. C. A. 7); A. E. Staley Mfg. Co. *v.* National Labor Relations Board, 117 F. 2d 868 (C. C. A. 7); Reliance Mfg. Co. *v.* National Labor Relations Board, 125 F. 2d 311 (C. C. A. 7); Kansas City Power & Light Co. *v.* National Labor Relations Board, 111 F. 2d 340 (C. C. A. 8); National Labor Relations Board *v.* Southwestern Greyhound Lines, Inc., 126 F. 2d 883 (C. C. A. 8); National Labor Relations Board *v.* Continental Oil Co., 121 F. 2d 120 (C. C. A. 10).

Continuing, the findings relate that the representatives of the I. O. E. in convention on July 17 and 18, drew up a proposed contract, embodying demands for a closed-shop, check-off of I. O.E. dues and substantial wage increases, which was sent to the Company with a request for a bargaining conference. The conference began on July 30, and the Company quickly gave recognition and offered no objection to the check-off provision, with the addition of a proviso that the employees might revoke their authorizations at any time. The by-laws of the I. O. E., however, required all members to authorize the deduction of dues, and the membership applications contained such authorizations. The closed-shop provision was discussed for two hours and then postponed for other matters until the following day, when it was again taken up for two hours and then agreed to with the addition, at the instance of the Company, of a provision that nothing in the contract should prevent employees from joining or remaining members of any other labor organization. Wage increases, costing the Company $600,000 annually, were granted, and, as President Holtzclaw had promised at the May 24 meeting in Richmond, they were made retroactive to June 1. The contract was formally executed August 5, and on August 20 the Company paid $3,784.50 to the I. O. E. as dues under the check-off provision, although it had not yet deducted that entire amount from the wages of its employees. The Board considered "the promptness with which the respondent [Company] agreed to grant the I. O. E. a check-off of dues and a closed shop . . . after a comparatively few hours discussion", and then found that the Company "agreed to the closed shop and the check-off of I. O. E. dues in order to entrench the I. O. E. among the employees and to insure its financial stability."

On the basis of these findings the Board concluded that:

"the respondent has engaged in a course of conduct calculated to restrain and discourage it's employees from self organization in nationally affiliated unions and to divert and canalize their organizational efforts to the establishment of a company-wide unaffiliated labor organization; that in its totality, the respondent's conduct has been coercive of its employees in the exercise of their right to self-organization, with the result that when they formed the I. O. E. they were not as free as the statute requires; that the I.O. E. is the fruit of the respondent's illegal interference with, and restraint and coercion of its employees; and that the respondent has dominated the formation and administration of the I. O. E., and has contributed financial and other support to it."

and again that:

"the I. O. E. was not the result of the employees' free choice; that it was initiated in response to the urgings of the respondent at the May 24 meetings to set up their 'own' organization; that the respondent's support of the organization during the critical formative period and its consistent opposition to nationally affiliated organizations are largely responsible for the adherence of the employees to the organization; and that the contract with the I. O. E. granting a closed shop and the check-off of the I. O. E. dues marked the climax of the respondent's efforts to erect an unaffiliated organization as a bulwark against nationally affiliated organizations. We find that the respondent has dominated and interfered with the formation and administration of the I. O. E. and has contributed support to it, . . ."

In discussing the appropriate remedy for the unfair labor practices found, the Board stated that the Company's domination and interference in the formation and administration of the I. O. E. constituted "a continuing obstacle to the exercise by the employees of the rights guaranteed them by the Act" and therefore the disestablishment of the I. O. E. was necessary. In addition the Board was of opinion that "under the circumstances of this case" the Company should be ordered to reimburse its employees for the amounts checked-off their wages and paid to the I. O. E.[2]

The company no longer attacks the conclusion that the I. O. E. was dominated by it, but it does contest the validity of the findings

[2] The Board's full statement on this point follows:

"The respondent concluded a closed-shop contract with the I. O. E., a company-dominated organization, thus compelling its employees to become and remain members of the illegal organization. Employees were in fact discharged because they refused to join the I. O. E. The check-off provision, a device by which the respondent assured the financial stability of the company-dominated organization, could no more be avoided by the employees than could the compulsory membership requirement. The bylaws of the I. O. E. required its members to execute check-off authorizations under penalty of being dropped from membership in the I. O. E., and thereby, under the closed-shop provision, from their jobs. We find that the monies thus deducted from the wages of the employees constituted the price of retaining their jobs, a price coerced from them for respondent's purpose of supporting and maintaining the organization which respondent had dominated in order to thwart bona fide representation. We further find that, as a result of the imposition of the illegal closed-shop and check-off requirements, the employees suffered a definite loss and deprivation of wages equal to the amounts deducted from their wages and paid over to the I. O. E. It is appropriate that the employees be made whole by reimbursement of amounts exacted from them for illegal purposes. We find that in these circumstances, the effects of the unfair labor practices may be fully remedied and the purposes and policies of the Act may be completely effectuated only by restoring the *status quo*. Hence, we shall order the respondent to reimburse its employees for the amounts deducted from their wages for dues and assessments in the I. O. E."

relating to domination in so far as may be pertinent to the reimbursement order, and it challenges the power of the Board to make that order under the circumstances of the case.

Under the applicable principles governing the scope of our review of Board orders, we think the Board's findings and conclusions regarding the Company's domination of and interference with the I. O. E. are supported by substantial evidence, and therefore conclusive. See *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584; *I. A. of M.* v. *Labor Board*, 311 U. S. 72; *Labor Board* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282; *Labor Board* v. *Nevada Copper Co.*, 316 U. S. 105; *Labor Board* v. *Southern Bell Telephone and Telegraph Co.*, — U. S. —, Nos. 460-461 this Term. These findings and conclusions are not subject to the infirmities of the original ones which prompted our decision in 314 U. S. 469. While the bulletin of April 26 and the speeches of May 24 are still stressed, they are considered not in isolation but as part of a pattern of events adding up to the conclusion of domination and interference. We are also of opinion that the Board had power to enter the check-off reimbursement order in the circumstances of this case.

Section 10(c) of the Act[3] authorizes the Board to require persons found engaged or engaging in unfair labor practices "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The declared policy of the Act in § 1 is to prevent, by encouraging and protecting collective bargaining and full freedom of association for workers, the costly dislocation and interruption of the flow of commerce caused by unnecessary industrial strife and unrest. See *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1. Within this limit the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative exemple of one type of permissible affirmative order, namely, reinstatement with or without back pay. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 187-89. The particular means by which the effects of unfair labor practices are to be expunged are matters "for the Board not the courts to determine." *I. A. of M.* v. *Labor Board*, *supra*, at p. 82; *Labor Board* v. *Link-Belt Co.*, *supra*, at p. 600. Here the Board, in the exercise of its informed discretion, has expressly determined that reimbursement in full of the checked-off dues is necessary to effectuate

[3] 49 Stat. 449; 29 U. S. C. § 151 *et seq.*

the policies of the Act. We give considerable weight to that administrative determination. It should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. There is no such showing here.

The Board found that the Company was responsible for the creation of the I. O. E. by providing its initial impetus and direction and by contributing support during its critical formative period. It further found that the Company quickly agreed to give its creature closed-shop and check-off privileges "in order to entrench the I. O. E. among the employees and to insure its financial stability". The result was that the employees, under the I. O. E. by-laws, had to authorize wage deductions for dues to remain members of the I. O. E., and they had to remain members to retain their jobs.[4] Thus, as a price of employment they were required by the Company to support an illegal organization which foreclosed their rights to freedom of organization and collective bargaining. To hold that the Board is without power here to order reimbursement of the amounts so exacted is to hold that an employer is free to fasten firmly upon his employees the cost of maintaining an organization by which he effectively defeats the free exercise of their rights to self-organization and collective bargaining. That this may pervert the purpose of the Act is clear. It is equally clear that the undoing of the effects of such a practice may, in the judgment of the Board, remove a very real barrier to the effectuation of the policies of the Act, the protection of commerce through the elimination of industrial conflict by guaranteeing full freedom of association and genuine collective bargaining to employees. An order such as this, which deprives an employer of advantages accruing from a particular method of subverting the Act, is a permissible method of effectuating the statutory policy.

It is argued that disestablishment of the I. O. E. sufficiently effectuates the policies of the Act by restoring to the employees of the Company their freedom of association. But the Board need not be satisfied with the remedy alone. It has here determined that, to effectuate fully the policies of the Act, it is necessary to expunge the effects of the unfair labor practices by

[4] The proviso in the check-off agreement that employees might revoke their individual authorizations at any time was admittedly meaningless in view of the closed shop agreement and the requirement in the I. O. E. by-laws that its members authorize the check-off.

ordering the reimbursement of checked-off dues. Such a determination seems manifestly reasonable. It returns to the employees what has been taken from them to support an organization not of their free choice and places the burden upon the Company whose unfair labor practices brought about the situation. The deduction of dues from wages under the circumstances of this case is not unlike a loss occasioned by a discriminatory discharge, and an order for the return of those checked-off dues promotes the policies of the Act in substantially the same manner as would a back pay award. By returning their money to the employees, the order severs possible economic ties which they may have with the employer dominated I. O. E. and to this extent aids in completely disestablishing that organization and restoring to the employees that truly unfettered freedom of choice which the Act demands. If employees have some assurance that an employer may not with impunity impose upon them the cost of maintaining an organization which he has dominated, any more than he can make them bear the burden of a discriminatory discharge, they may be more confident in the exercise of their statutory rights.

The Company contends that the Board did not find that it continued to interfere with the I. O. E. after its organization, except with regard to the closed-shop and check-off clauses of the contract, and this finding is attacked as without foundation in evidence. It is said that the demand for a closed-shop and check-off originated with the employees who were free to abandon those provisions at any time by changing their by-laws or the contract, and that therefore the continuation of those requirements was the voluntary action of the employees for which the Company is not responsible. Finally it is urged that the Company should not be compelled to reimburse these voluntary payments because the employees received benefits, including substantial wage increases, from the I. O. E.

The short answer is that the Board has resolved all these contentions against the Company, and we cannot say it exceeded its competence in so doing. It made no finding of specific management interference in the I. O. E. after the execution of the contract, but it did conclude that the I. O. E.'s existence was a "continuing obstacle" to the employees' exercise of their statutory rights. This conclusion of continuation of the effects of an employer dominated beginning is a permissible one for the Board to draw. Cf. *Labor Board* v. *Southern Bell Telephone*

and Telegraph Co., — U. S. —, Nos. 460-461 this Term. It disposes of the argument that the men were free at any time to eliminate the check-off; because of the I. O. E.'s origin the Board could conclude, as it did, that they were not as free as the statute requires. Also, in view of the Company's interference in and support given to the I. O. E. and the celerity of agreement in the bargaining conference, the Board could infer, despite the fact that demands for the closed-shop and the check-off originated with the I. O. E., that the Company seized upon those provisions to establish the I. O. E. firmly. The fact that a contrary inference is possible from the evidence does not allow us to set aside the one drawn by the Board. *Labor Board* v. *Nevada Copper Co.*, 316 U. S. 105. This dissipates the force of the argument that the closed-shop and check-off provisions were forced upon the Company against its will.

The instant reimbursement order is not a redress for a private wrong. Like a back pay order it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private rights. Cf. *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. 2d 146, 150-51; *Phelps Dodge Corp* v. *Labor Board*, 313 U. S. 177. For this reason it is erroneous to characterize this reimbursement order as penal or as the adjudication of a mass tort. It is equally wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order, or to force it to inquire into the amount of damages actually sustained. Whether and to what extent such matters should be considered is a complex problem for the Board to decide in the light of its administrative experience and knowledge. The Board has here determined that the employees suffered a definite loss in the amount of the dues deducted from their wages and that the effectuation of the policies of the Act requires reimbursement of those dues in full. We cannot say this considered judgment does not effectuate the statutory purpose.

The argument that the employees received some value from

their contributions via the check-off to the Company dominated I. O. E., is based upon the assumption that such an organization necessarily gives some *quid pro quo*. But in view of the purposes of the Act, a contrary assumption, that employees receive no benefit from a type of organization which Congress has characterized as detrimental to the interests of employees and provocative of industrial unrest, is possible. These are considerations for the Board to decide according to its reasoned judgment. We hold that the Board here made an allowable judgment. That judgment cannot be upset by pointing to substantial wage increases which the I. O. E. was granted. As the court below said, "it is manifestly impossible to say that greater benefits might not have been secured if the freedom of choice of a bargaining agent had not been interfered with." 132 F. 2d at 398. Cf. *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, 559.

This reimbursement order cannot be labelled "penal". The purpose of the order is not to penalize the Company by requiring repayment of sums it did not retain in its treasury. Those sums did go into the treasury of the Company's creature to accomplish purposes the Company evidently believed to be to its advantage, and the order of reimbursement is intended to remove the effects of this unfair labor practice by restoring to the employees what would not have been taken from them if the Company had not contravened the Act. This is not a case in which the Board has ordered the payment of sums to third parties, or has made employees more than whole. Cf. *Republic Steel Corp.* v. *Labor Board*, 311 U. S. 7. The fact that the Board may only have approximated its efforts to make the employees whole, because of asserted benefits of dubious and unascertainable nature flowing from the I. O. E., does not convert this reimbursement order into the imposition of a penalty. Cf. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 583-84.

We need not now examine the various situations that were before the Circuit Courts of Appeals in the case collected in Note 1, *ante*, or consider hypothetical possibilities. We decide only the case before us and sustain the power of the Board to order reimbursement in full under the circumstances here disclosed.

Affirmed.

Mr. Justice FRANKFURTER, concurring.

If the controlling facts in this case were like those in *Western Union Tel. Co.* v. *Labor Board*, 113 F. 2d 992, I too would accept

We start with the Board's finding - a finding not here for review -

the reasoning of Judge Learned Hand's opinion in that case and join my brother ROBERTS. But the vital difference between the *Western Union* and this case is that in the former "there was no evidence that all those [employees] who asked to have their wages stopped, did so in any part because they were coerced." *Id.*, at 997. Here the employees had no such choice; they could avoid the check-off of union dues only by giving up their jobs.

~~It is not denied~~ that through its domination of the I. O. E. the Company indulged in an unfair labor practice. But not only did it foster that company union, it foisted membership in the union upon all its employees. The Board had a right to find that membership in the union, which the employees had no power to reject, equally denied the employees the power to reject the costs of that membership. It was therefore justified in concluding that the employees should be made whole for that which was the consequence of the Company's compulsion upon them. Therein this case differs not only from the *Western Union* case but also from the decisions in four other circuits upon which my brother ROBERTS relies: *Labor Board* v. *West Kentucky C. Co.*, 116 F. 2d 816, 823 (C. C. A. 6); *Reliance Mfg. Co.* v. *Labor Board*, 125 F. 2d 311 (C. C. A. 7); *Labor Board* v. *Southwestern Greyhound Lines*, 126 F. 2d 883, 887 (C. C. A. 8); *Labor Board* v. *Continental Oil Co.*, 121 F. 2d 120, 125 (C. C. A. 10).

Needless to say, we have nothing to do with the wisdom of the Board's requirement that the coerced dues be restored to the employees. Our decision can go no further than that, within the framework of the general authority given to it by Congress, the Board is empowered to find that when men pay dues to a company-dominated union, upon pain of forfeiting their jobs, it is the company which has in fact commanded the payment of the dues and it is the company which must make restoration.

Mr. Justice ROBERTS.

The single question presented is whether the National Labor Relations Board, in ordering disestablishment of an unaffiliated union, may, in the circumstances disclosed, order reimbursement of dues paid by the employes to the union pursuant to individual assignments by employes and a union agreement for a closed shop and a check off of dues.

The court below (one judge dissenting) has sustained this feature of the order. I am of opinion that its judgment should be reversed.

The only provision of the Act on which the Board relies is that found in § 10(c)[1] which is that the Board may require the employer "to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The critical phrase is "to take such affirmative action . . . as will effectuate the policies of this Act." The policies of the Act are stated in § 1[2] as the encouragement of the practice and procedure of collective bargaining and the protection of the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[3] It is plain that a reimbursement order may be made by the Board only if it will effectuate these policies.

The court below has interpreted this grant of power to the Board as permitting what the court characterizes as a restoration of the *status quo*. The Act, however, contains no such expression and if it is given, as I think it has been in the present instance, the meaning of redress of private wrongs, it misrepresents the clear intent of the statute.[4]

The Act gives the Board no power to impose liability for any supposed injury arising out of the compulsion of employes to contribute dues to the union. Nor can the order of restitution be grounded upon any theory that although the unfair labor practice constitutes a public rather than a private wrong the power granted to effectuate the policies of the Act envisages imposition of a penalty for wrongful conduct on the part of the employer.[5]

There remains the question whether the order under review can be justified as appropriate to effectuate the policies of the Act. This question should be answered in the light of the facts

[1] 29 U. S. C. § 160(c).

[2] 29 U. S. C. § 151.

[3] See Republic Steel Corp. v. N. L. R. B., 311 U. S. 7, 10; N. L. R. B. v. Fansteel Corp., 306 U. S. 240, 257.

[4] H. R. 972, 74th Cong., 1st Sess., p. 21; H. R. 1147, 74th Cong., 1st Sess., p. 24. National Licorice Co. v. N. L. R. B., 309 U. S. 362, 363.

[5] Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 236; Republic Steel Corp. v. N. L. R. B., 311 U. S. 7, 11, 12.

disclosed by the record. The Board has found that the employer was guilty of unfair labor practices in influencing employes in favor of a company union. The order requires the company to cease and desist from the practices, to cease giving effect to the existing agreement with the union, and to withdraw recognition from and disestablish that organization as a bargaining unit. This order is supported by findings that, at a time when no union existed, the company threw its influence in favor of an unaffiliated or company union. All the facts found in this connection relate to a time anterior to the organization of the union. There is no finding, and no facts which would justify a finding, that subsequent to the organization of the union the employer interfered with it, dominated it, or supported it in any manner. The union then organized made demands upon the company which were the subject of negotiations and out of those negotiations grew an increase of wages totaling about $600,000 per annum and a collective bargaining agreement which contained provisions for a closed shop and for the check off of union dues, both of which features were demanded and insisted upon by the union. There is no finding and no evidence that the employer in fact inspired, instigated, or coerced the employes to make these demands or had, even remotely, anything to do with them other than they followed its earlier encouragement of the organization of the union. From the day that contract was signed, no act of interference or domination, and no word even of suggestion from the company as to the union policy or practices is shown. The record demonstrates that the employer insisted that the check off of union dues should be authorized by each employe individually, subject to his untrammeled right of revocation, and that the closed shop provision should not prevent any member of the company union from also joining any other union of his choice. The fixation of the union dues was a matter within the control of the union members and continuance of check off as respects any employe was a matter for his voluntary determination so far as the employer was concerned. While it is not denied that the union procured substantial benefits for its members or that it represented them faithfully and fairly, nevertheless, because of the company's interference at the time of the organization of the union, that organization has been disestablished and indeed has now been dissolved.

It is to be noted that had it not been for the defect which tainted its capacity to represent the employes, its other activities

would have been wholly in accordance with the objects and purposes of the National Labor Relations Act. Nothing in that Act invalidates a collective bargaining agreement providing for a closed shop or for a check off of dues. If in fact those features of the agreement were the voluntary act of the employes, as on this record they must be found to have been, it is difficult to see how the policies of the Act are to be effectuated by repayment to the employes of the dues heretofore paid when such repayment can in no wise benefit the association which has been disestablished.

The company union having been disestablished, the employes are free to form or join any union and make it their bargaining agent. Any possible effect of company influence has been dissipated. The only possible effect of restitution of dues to employes who have not asked for repayment, who have received substantial benefits, from their contribution of dues, is to punish the employer and perchance operate as a warning to other employers that they will similarly be punished for unfair labor practices.

The Board seeks to sustain the order on the ground that the Act authorizes, as one form of affirmative action to effectuate the policies of the Act, the reinstatement of employes with or without back pay. The award of back pay, however, stands on a different basis. If employes are to be faced with discriminatory discharge for advocating union representation by an organization of their choice the threat will render doubtful, if not impossible, free and uncontrolled action on the part of the employes. The Act, therefore, is an announcement to employes that if they are discharged for such activity they may have reinstatement and, in proper cases, back pay. Such a promise to employes was essential to assure them immunity for conduct made lawful by the Act. But the payment of union dues is quite another matter, particularly where, as here, no employe was obliged to join the union, and no discrimination between employes resulted from joining or paying dues to the recognized union. It is inconceivable that the hope of reimbursement of dues paid to the union in question would have any effect on the conduct of the members to join or refrain from joining this union or joining another as they were free to do. Moreover, the employes were free under the Act to adhere to another organization and to bring about an election for the choice

of another bargaining representative. The Board made no inquiry and no finding respecting coercion of individual employes.

As I have already indicated, the only effect of the order is to redress a supposed private wrong to employes which the evidence and findings indicate never was inflicted, and to inflict drastic punishment of the employer for its earlier violation of the statute by encouraging its employes to organize. Neither is within the competence of the Board, as this court has repeatedly held.[6]

Like orders have been before the courts in eleven other cases as shown by the opinion of the court. All have reached the conclusion that the Act does not authorize such an order.[7] I think that should be the decision of the Court in this case.

The CHIEF JUSTICE and Mr. Justice JACKSON join in this dissent.

[6] See Notes 4 and 5, *supra*.

[7] I might well have contented myself, in lieu of writing, with a reference to the opinion in Western Union Tel. Co. *v.* N. L. R. B., 113 F. 2d 992, which exhaustively and convincingly deals with the subject.